Defending Sex Offense Cases

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The following outline was originally prepared for a presentation called "Beware of Alligators: Confronting Forensic Interviews, Limiting Expert Testimony, and Blocking Improper Vouching in Child Sexual Abuse Cases" at the 2010 Public Defender Conference. This outline was updated for a presentation at the 2012 Public Defender Conference called "Who's Driving the Bus: Understanding and Confronting the Cottage Industry in Child Sexual Abuse Cases." In addition to including cases decided in since the 2010 Public Defender Conference, the 2012 outline added Section V on the prosecution strategy, which is intended to help counsel anticipate and confront a typical prosecution case.

This outline is intended to be a quick reference for identifying common issue arising in child sexual abuse cases in South Carolina. The outline is intended to encourage thorough, creative, and zealous representation. Attorneys using this outline, therefore, should consult relevant statutes, court rules, and case law, as well as conducting additional research as the individual case requires.

Table of Contents

Part I
Offenses, Definitions, Indictments and Jury Instructions

I. Offenses

A. Code/offense/penalty table

The following is a table of the commonly prosecuted sex offenses and the penalty.

Code Section	Offense	Penalty
§13-3-615	Spousal sexual battery	10 years
§16-3-652	CSC 1st degree	30 years
§16-3-653	CSC 2nd degree	20 years
§16-3-654	CSC 3rd degree	10 years
§16-3-655(A)(1)	CSC w/ minor 1st degree (victim less than 11)	25 to life[1]
§16-3-655(A)(2)	CSC w/ minor 1st 2nd offense (victim less than 16)	10 to 30 yrs
§16-3-655(B)(1)	CSC w/ minor 2nd degree (victim 11 to 14)	20 years
§16-3-655(B)(2)	CSC w/ minor 2nd degree (victim 14 to 16)	20 years
§16-3-655(C) §16-15-140	CSC w/ minor 3rd degree Committing/attempting lewd act (victim under 16)[2]	15 years
§16-3-656	Assault w/ intent to commit CSC	Same as CSC
16-15-130	Indecent exposure	3 years
16-15-305	Disseminating, procuring, or promoting obscenity	5 years
§16-15-342	Criminal solicitation of a minor	10 years
16-15-345	Disseminating obscene material to person under 18	10 years
16-15-355	Disseminating obscene material to person 12 or less	15 years
16-15-365	Exposing private parts in lewd or lascivious manner	6 months
16-15-385	Disseminating harmful material to minor or exhibiting harmful performance to minor	10 years
16-15-387	Employment of person under 18 to appear in public in state of sexually explicit nudity	10 years
16-15-395	1st degree sexual exploitation of minor	3 to 20 years
16-15-405	2nd degree sexual exploitation of minor	2 to 10 years
16-15-410	3rd degree sexual exploitation of minor	10 years
16-15-415	Promoting prostitution of a minor	3 to 20 years
16-15-425	Participation in prostitution of a minor	2 to 5 years
16-17-470(A)	Peeping Tom	3 years
16-17-470(B)	Voyeurism, 1st offense	3 years

[1] Section 16-3-655 also provides for the death penalty under certain circumstances. *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.

[2] 2012 Act No. 255 re-codified lewd act as criminal sexual conduct with a minor, third degree. The Act also added a Romeo provision: "However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age."

16-17-470(B)	Voyeurism, 2nd or subsequent offense	5 years
16-17-470(C)	Aggravated voyeurism	10 years
16-17-490	Contributing to the delinquency of a minor[3]	3 years

B. Other offenses

1) ABHAN and the new assault and battery statue.

a) Traditionally, ABHAN was considered a lesser-included offense of the CSC offenses. There are a number of cases identifying when a defendant is entitled to an instruction on this lesser included offense. With the Omnibus Crime Reduction Sentencing Reform Act of 2010, the General Assembly abrogated the common law offense of ABHAN. Common law ABHAN is still a lesser included offense for offenses occurring before June 2, 2010, the effective date of the Act.

b) S.C. Code §16-3-600 created two new offenses that should be considered lesser-included offenses of the **adult** CSC offenses under the appropriate facts. 2011 Act No. 39, effective June 7, 2011, substituted "person" for "adult," making the new offenses lesser-included offenses of criminal sexual conduct with a minor.

1) "A person commits the offense of assault and battery in the first degree if the person unlawfully injures another person, and the act involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent." S.C. Code §16-3-600(C)(1)(a)(i). This offense is a felony punishable by up to ten years.

2) **"**A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and the act involves the nonconsensual touching of the private parts of a person, either under or above clothing." S.C. Code §16-3-600(D)(1)(b). This offense is a misdemeanor punishable by up to three years.

- **Practice tips:**

1) By creating these new offenses and by re-codifying lewd act as CSC w/ Minor 3rd, the General Assembly has re-opened the door to arguments that A&B offenses are lesser-included offenses of CSC w/ minor 3rd.

[3] Contributing to the delinquency of a minor is not inherently a sex offense. However, it is included here because it can be used as an alternate charge for a guilty plea. With the recent abrogation of the common law offenses of ABHAN and the exclusion of a sexually based assault in the new assault and battery statute, contributing to the delinquency o a minor may become a standard plea option in consensual CSC with a minor case. *See* Section I(B)(1), *infra*.

2) Contributing to the delinquency of a minor remains an alternate charge for a guilty plea.

2) Accessory before the fact to CSC w/ with a minor. *State v. Claypoole*, 371 S.C. 473, 639 S.E.2d 466 (Ct. App. 2006) (defendant mother knew about domestic partner's sexual relationship with her victim daughter, she allowed partner to reside in same house with girls, she was aware of court order prohibited any contact between partner and girls, she continued to aid partner by failing to stop him from having sex with victim, and she told her neighbor that she did not understand why everyone was so concerned with partner and victim having sex, because she stated that permitting older men to have sex with young girls was a good way to teach them about sex).

II. Definitions

A. S.C. Code Ann. §16-3-651. Criminal sexual conduct: definitions. "For the purposes of §§ 16-3-651: to 16-3-659.1."

Actor	a person accused of criminal sexual conduct
Aggravated coercion	the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person
Aggravated force	the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.
Intimate parts	includes the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being
Mentally defective	a person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct
Mentally incapacitated	a person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause
Physically helpless	a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act
Sexual battery	sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes
Victim	the person alleging to have been subjected to criminal sexual

	conduct

B. Additional matters related to definitions.

1) Aggravated force. In *State v. Green*, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997), the Court held the defendant was entitled to a directed verdict on a CSC 1st charge because the state failed to prove "aggravated force." The Court reasoned:

> While the victim testified that Green had his hands on her shoulders during the attacks, she did not testify that he held her down or otherwise used any force. Instead, when asked whether she ever tried to make him stop, the victim stated, "I tried to move once, but he told me to relax." Clearly, the victim's testimony demonstrates the extent to which she acquiesced to Green's exercise of his parental authority; however, it does not support an inference that Green used any force to accomplish the sexual batteries.

2) Aggravated Coercion. "The language 'aggravated coercion' is meant to provide that the sexual battery occurred under circumstances where the victim's consent was lacking." *State v. Cox*, 274 S.C. 624, 628, 266 S.E.2d 784, 786 (1980).

3) Penetration

a) Proof of Penetration

1) *State v. Mathis*, 287 S.C. 589, 340 S.E.2d 538 (1986). The court reasoned:

> The six-year-old prosecutrix testified that Mathis touched her with his penis. She could not remember if he put it inside her body. However, when asked if it hurt, she replied that it had. This is evidence of some "intrusion, however slight," as is required by §16-3-651(h). A jury issue was created and the trial judge properly denied Mathis' motion for a directed verdict.

2) *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) *abrogated on other grounds State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). Case involved multiple victims.

One victim's "testimony that respondent touched her and it hurt and the results of her physical examination [finding injury inside vagina consistent with sexual abuse] were sufficient to create a jury question as to whether there was any intrusion."

Another victim testified the defendant touch her and "'It made me feel bad.'" The Court held, "Inappropriate touching can cause a child to 'feel bad.' Without more, this statement is not sufficient evidence of an intrusion. There

was no circumstantial evidence presented to create a question for the jury on the issue. [This victim's] physical examination revealed no signs of a sexual battery."

b) Penetration is not required for all CSC. *State v. Morgan*, 352 S.C. 359, 372-73 574 S.E.2d 203, 209-10 (Ct. App. 2002). The Court reasoned:

> The act of cunnilingus is statutorily enumerated as "sexual battery." The etymological construction of the statute reveals legislative intent to separate acts and conduct. The phrase "or any intrusion" is grammatically located after *seriatim* presentation of sexual intercourse, cunnilingus, fellatio, and anal intercourse. There is no modifying efficacy of the phrase "or any intrusion" as juxtaposed to "cunnilingus." The word "or" is a coordinating conjunction introducing an alternative.
>
> We hold section 16-3-651 is clear and unambiguous. The term "cunnilingus" identifies a separate and distinct act constituting "sexual battery." "Cunnilingus," in its plain and ordinary meaning, is defined as oral stimulation of the vulva or clitoris with the lips or tongue. "Cunnilingus" is medically and legally accomplished by licking or kissing the vulva or clitoris. It is a type of oral genital sexual activity.
>
> We rule the sexual offense of "cunnilingus" is complete when the cunnilinguist licks or kisses the female genitalia. Penetration of the vagina is ***NOT*** necessary or required.
>
> Assuming the statute could be construed as requiring "sexual penetration," this Court concludes the very act of "cunnilingus" involves sexual penetration.

4) "[T]he terms "sexual abuse" and "sexual battery" are not synonymous."

a) *State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001) *overruled on other ground by State v. Gentry*, 610 S.E.2d 494, 501, 363 S.C. 93, 106 (2005) ("'Sexual battery' does not mean any battery of a sexual nature. Rather, it is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort.").

b) *Terry v. State*, 383 S.C. 361, 372, 680 S.E.2d 277, 283 (2009) (trial counsel's failure to accurately define sexual battery to defendant before the guilty plea hearing constituted deficient performance, but such failure did not prejudice defendant.)

1) To be a "sexual battery," the conduct must be listed under S.C. Code §16-3-651(h).

2) S.C. Code 17-25-135(b)(2): "Sexual abuse" means: (a) actual or attempted sexual contact with a child; or (b) permitting, enticing, encouraging, forcing, or otherwise facilitating a child's participation in prostitution or in a live performance or photographic representation of sexual activity or sexually explicit nudity; by any person including, but not limited to, a person responsible for the child's welfare, as defined in Section 63-7-20.

3) **"**Clearly, a severe incident of child sexual abuse may constitute a "sexual battery" and, in turn, CSC with a minor. However, one who sexually abuses a child is not necessarily guilty of CSC with a minor. For example, an inappropriate touching of a child without penetration of the child's "genital or anal openings" would constitute sexual abuse, but would not necessarily rise to the level of a "sexual battery" and a charge of CSC with a minor. Instead, such sexual abuse would warrant a charge of lewd act upon a child." *Terry*, 383 S.C. at 372, 680 S.E.2d at 283.

5) Romeo's Law. "[A] person may not be convicted of [CSC w/ a minor 2nd degree] if he is eighteen years of age or less when he engages in consensual sexual conduct with another person who is at least fourteen years of age." S.C. Code Ann. §16-3-653(B)(2).

- **Practice tip:** Romeo's Law did not apply to lewd act charges. However, 2012 Act No. 255 re-codified lewd act as criminal sexual conduct with a minor, third degree. The Act also added a Romeo provision: "However, a person may not be convicted of a violation of the provisions of this subsection if the person is eighteen years of age or less when the person engages in consensual lewd or lascivious conduct with another person who is at least fourteen years of age."

III. Indictments

A. Amendments to Indictment.

1) *State v. Riddle*, 301 S.C. 211, 391 S.E.2d 253 (1990) (Amendment of indictment at close of evidence to charge assault with intent to commit first-degree criminal sexual conduct rather than assault with intent to commit third-degree criminal sexual conduct was improper; amendment increased charge and possible punishment.).

2) *State v. Warren,* 330 S.C. 584, 500 S.E.2d 128 (Ct. App. 1998) *reversed on other grounds* 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (Amendment changing the age of the alleged victim from 15 to 14 years of age was permissible because it did not change the nature of the offense).

3) *Wilson v. State*, 327 S.C. 45, 488 S.E.2d 322 (1997) (Amendments to indictment for second-degree criminal sexual conduct with a minor, changing name of offense within body of indictment, and age of victim, did not change substantive nature of offense, where, like original indictment, amended indictment set forth all of statutory elements of offense, and amendment to victim's age from 15 to 14 years old did not alter victim's status as minor).

B. Time is not an essential element of CSC.

1) "An indictment must sufficiently apprise the defendant of what he or she should be prepared to meet. Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred. In such a case, however, the indictment must show the offense was committed prior to the finding of the indictment." *State v. Wingo*, 304 S.C. 173, 175 403 S.E.2d 322, 323 (Ct. App. 1991) (internal citations omitted).

2) *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991) (Because time is not an essential element of CSC, alleging the offense occurred on or about a specific date is sufficient).

C. Broad time frame. In *State v. Wade*, 306 S.C. 79, 409 S.E.2d 780 (1991), the Court declined to adopt a *per se* rule that a two year time frame in which the crime might have occurred is overbroad. Rather, this state follows a case-by-case approach where "the sufficiency of an indictment must be judged from a practical standpoint, with all of the circumstances of the particular case in mind."

- **Practice Tip:** Wade at last implies that the broad timeframe could e overbroad. Counsel, therefore, should bring such a challenge in appropriate cases. Additionally, the alibi notice provisions of Rule 5(e)(1) could be used to argue the state has to be more precise about the time of the allegations.

D. Location of Offense. *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991) (alleging the county where the crime is alleged to have occurred is sufficient).

- **Practice Tip:** Regarding date, time, and place of an offense, a defendant might have more recourse through discovery. Rule 5(e)(1) provides:

> Upon written request of the prosecution stating the time, date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

A copy of an objection to the state's request for the defense to notice and alibi and motion to require a more definite and certain request to notice and alibi defense is attached.

IV. Jury Instructions

J. Corroboration of victim's testimony.

1) Pursuant to S.C. Code §16-3-657, "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658."

   - **Practice tip:** This instruction did not apply to lewd act (§16-15-140). By re-codifying lewd act as CSC w/ a minor 3rd (§16-3-655(C)), this instruction will apply.

2) "A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law. The jury in this case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses." *State v. Rayfield*, 369 S.C. 106, 117-8, 631 S.E.2d 244, 250 (2006).

3) ***No corroboration instruction is not a comment on facts.*** "The trial judge properly charged the jury it could believe any single witness over several, it was the sole judge of the facts, he had no opinion about those facts, and the State had the burden of proving the offense charged beyond a reasonable doubt." *State v. Schumpert*, 312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993).

4) *State v. Hill*, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011) ("Here, the sole instruction the trial judge charged the jury on corroboration was as follows: 'The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence.' Notably, the judge immediately followed that statement with, 'Necessarily you must determine the credibility of witnesses who have testified in this case.' The judge also included in her charge several instructions regarding the State having the burden to prove Hill guilty beyond a reasonable doubt, and further charged the jury that it was the exclusive judge of the facts and was not to infer that the trial judge had any opinion about the facts. Thus, this jury was thoroughly instructed on the State's burden of proof and the jury's duty to find facts and judge credibility of witnesses, as well as admonished not to infer that the trial judge had any opinion about the facts. Accordingly, the single instruction on 'no corroboration,' was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the 'no corroboration' charge.").

   - **Practice tip:** *Hill* notwithstanding, *Rayfield* and *Schumpert* suggest possible error if the no corroboration instruction is over emphasized.

Trial counsel might be able to convince a judge not to give the instruction or to otherwise minimize the impact of the instruction.

5) Corroboration not barred. *State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980).

K. Lesser Included Offenses

1) Lewd act is not lesser included of CSC with a minor. *Campbell v. State*, 342 S.C. 100, 535 S.E.2d 928 (2000) *overruled on other grounds State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) *State v. Brock*, 335 S.C. 267, 516 S.E.2d 212 (Ct. App. 1999); and *State v. Norton*, 286 S.C. 95, 332 S.E.2d 531 (1985).

   - **Practice tips:**

     a) By creating these new offenses and by re-codifying lewd act as CSC w/ Minor 3rd, the General Assembly has re-opened the door to arguments that A&B offenses are lesser-included offenses of CSC w/ minor 3rd.

     b) Consider whether someone can be convicted of both CSC with a minor and lewd act for the same conduct. Following the reasoning of *Terry v. State,* discussed in Section II(B)(4)(b) *supra*, every CSC (sexual battery) would also be a lewd act (sexual abuse).

2) CSC with a minor 2nd degree is not lesser included of CSC with a minor 1st degree. *Cohen v. State*, 354 S.C. 563, 582 S.E.2d 403(2003) *overruled on other grounds State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

3) CSC with a minor 2nd degree is not lesser included of CSC 2nd degree. *State v. Munn*, 292 S.C. 497, 357 S.E.2d 461 (1987) *overruled on other grounds State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

4) CSC 3rd is not lesser included of CSC with a minor. *State v. Green*, 343 S.C. 207, 539 S.E.2d 419 (Ct. App. 2000).

Part II
General Evidentiary Issues

This subsection discussed general evidentiary considerations. Issues involving sex abuse professionals, including introducing statements of children under twelve pursuant to S.C. Code §17-23-175 are discussed in Part III, infra.

I. Competency to Testify.

A. Rule 601(b), SCRE. "A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth."

B. ***State v. Needs***, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998) (internal citations omitted):

> A proposed witness understands the duty to tell the truth when he states that he knows that it is right to tell the truth and wrong to lie, that he will tell the truth if permitted to testify, and that he fears punishment if he does lie, even if that fear is motivated solely by the perjury statute. . . . [I]n order to be competent to testify, a witness must have the ability (1) to perceive the event with a substantial degree of accuracy, (2) remember it, (3) communicate about it intelligibly, and (4) be mindful of the duty to tell the truth under oath.

C. ***In re Michael H.***, 360 S.C. 540, 602 S.E.2d 729 (2004). Trial court can order a child victim to submit to an evaluation for competency. The defendant must show a compelling need for the evaluation. "The factors are intended to assist the trial judge in weighing the defendant's need for the examination against the victim's right to privacy and include the following: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use."

- **Practice Tips:**

  - In *Michael H.*, evidence of auditory hallucinations established a compelling need for the evaluation. Trial Counsel's investigation of an alleged victim's competency to testify, therefore, should include a review of mental health treatment records. *See* Part III, Section II, *infra*.

- Sample motions to request a competency hearing, to exclude the alleged victim's testimony based on lack of competency, and to disclose information about the alleged victim's disability are attached.

- Look to other jurisdictions: For example, in addition to the discussion below, look at the cases cited in Delany.

  Michael H. adopted the West Virginia Supreme Court's procedure outlined in State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992). Delaney, in fact, involved a situation where the prosecution expert had access to the victims, but the defense experts did not. See Delaney, 187 W.Va. at 215, 417 S.E.2d at 905 (sexual trauma counselor testified the three victims "displayed symptoms of children who had been sexually assaulted or abused").

  Following Delaney, Wisconsin holds, "When the state manifests an intent during its case-in-chief to present testimony of one or more experts, who have personally examined a victim of an alleged sexual assault, and will testify that the victim's behavior is consistent with the behaviors of other victims of sexual assault, a defendant may request a psychological examination of the victim. State v. Maday, 179 Wis.2d 346, 359-60, 507 N.W.2d 365, 372 (Ct. App. 1993). Maday adopted the "compelling need" test outlined in Delaney, including the six factors for the trial court to consider. Maday added a seventh factor:

  > The trial court should consider, based on the testimony of the defendant's named experts, whether or not a personal interview with the victim is essential before the expert can form an opinion, to a reasonable degree of psychological or psychiatric certainty, that the victim's behaviors are consistent with the behaviors of other victims of sexual abuse.

  Id. 179 Wis.2d at 360, 507 N.W.2d at 372.

II. Rule 404(b), SCRE (*Lyle*). *Rule 404(b) is discussed frequently at the Public Defender Conference and other seminars. This section is not intended to be an all inclusive discussion of the Rule. Rather, this section is intended to identify Rule 404(b) issues as they often present in sex offense cases. Whenever there is a potential Rule 404(b) issue in a case, counsel should thoroughly research the rule as it applies to the unique facts of the case.*

A. Propensity evidence not admissible. *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (declining to recognize a special rule allowing admission of evidence of a propensity to commit a sex crime).

B. Other bad acts involving different victims. In *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), the majority held, "A close degree of similarity establishes the required connection between the two acts and no further "connection" must be shown for admissibility." Justice Pleicones dissented and wrote:

> I respectfully dissent. In my opinion, our cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. In light of the controversy engendered by these rules in other jurisdictions, I believe that thorough scrutiny is warranted.

Id. at S.C. 435-36 (internal citations and footnote omitted).

- **Practice tip:** There is a good faith reason to believe the majority of the Supreme Court no longer supports the holding in *Wallace*. Justice Hearn wrote the Court of Appeals opinion that was reversed in *Wallace*. When he was on the Court of Appeals, Justice Kittridge wrote the opinion in *State v. Tuffour*, 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005) vacated and superseded 371 S.C. 511, 641 S.E.2d 24 (2007) ("The appellate courts of this state have unwaveringly adhered to the rule of exclusion of prior bad act evidence to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence. **It bears reminder that *Lyle* Rule 404(b) set forth a rule of exclusion, not inclusion."** (emphasis original). Therefore, it is reasonable to conclude Pleicones, Kittridge, and Hear now represent the majority and would overrule *Wallace*.

  A sample motion to overrule Wallace is attached.

C. Other bad acts involving the same victim are admissible. In *State v. Clasby*, 385 S.C. 148, 157-58 682 S.E.2d 892, 897 (2009), the Supreme Court summarized holding in this state allowing admission prior assaults involving the same victim:

> [U]nder similar circumstances to the instant case, this Court and the Court of Appeals have found prior bad act evidence was

> properly admitted under the common scheme or plan exception. *See State v. McClellan,* 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (concluding that victim's testimony regarding prior attacks by defendant, which were not the subject of an indictment, was properly admitted under the common scheme or plan exception in trial for CSC with a minor, second degree where testimony showed "the continued illicit intercourse forced upon her by [defendant]"); *State v. Kirton,* 381 S.C. 7, 36, 671 S.E.2d 107, 121-22 (Ct.App.2008) (holding evidence that defendant began touching and committing other sexual misconduct with victim when she was six or seven years old was admissible to show common scheme or plan during trial for the indicted offense of CSC with a minor, second degree on the ground that the "six to seven year pattern of escalating abuse of Victim by [defendant was] the essence of grooming and continuous illicit activity"); *State v. Mathis,* 359 S.C. 450, 464, 597 S.E.2d 872, 879 (Ct.App.2004) (concluding evidence of uncharged sexual misconduct committed by the defendant on the victim three times prior to the indicted offense of CSC with a minor, second degree was admissible where the "three earlier assaults on the victim were all attempted in the same manner and under similar ***158*** circumstances"); *State v. Weaverling,* 337 S.C. 460, 471, 523 S.E.2d 787, 792 (Ct.App.1999) (finding victim's testimony regarding pattern of sexual abuse he suffered by the defendant was properly admitted as part of a common scheme or plan exception in trial for CSC with a minor and disseminating harmful material to a minor where the "challenged testimonial evidence of [defendant's] prior bad acts show[ed] the same illicit conduct with the same victim under similar circumstances over a period of several years").

In addition to those cases cited in *Clasby*, other cases have reached the same result. *See State v. Richey*, 88 S.C. 239, 70 S.E. 729 (1911) (The Court adopted "the view that acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties."); *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955) (affirmed admitting testimony of a second sexual assault by the defendant against the same victim that occurred several hours later.);

- **Practice tip:** *Clasby* distinguished the Court of Appeals case of *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003) which excluded evidence of prior, uncharged conduct involving the same victims, noting "the sexual battery in the charged offense and the uncharged act was not of the same type." *Clasby*, 385 S.C. at 158, fn.2, 682 S.E.2d at 897, fn. 2. *Tutton* has been scrutinized in *Wallace, supra* and *Clasby*, but the Supreme Court has not overruled the case. Tutton, therefore could be useful ammunition in the appropriate case.

D. Crimes against multiple victims at the same time are admissible. *E.g. State v. Brooks*, 235 S.C. 344, 111 S.E.2d 686 (1959) *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315, 305 S.C. 45 (1991) (affirmed allowing the alleged victim's companion to testify that she was raped at the same time and in the same place as the alleged victim).

E. Counsel may be ineffective for eliciting evidence of other bad acts. In *State v. Warren*, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (emphasis original), the Supreme Court observed:

> The fundamental problem with this case is that the "bad act" evidence was not presented **by the State** as substantive evidence of guilt, nor was it introduced **by the State** in an attempt to impeach respondent's character. Instead, it was introduced largely through the questioning conducted by respondent's attorney. While we appreciate the efforts of the Court of Appeals to find an avenue affording respondent relief, it simply cannot be done on this record. We express no opinion whether respondent may be entitled to relief in a collateral proceeding.

➢ **Practice tip**s:

- Whenever counsel suspects the state might have undisclosed Rule 404(b) evidence, move for the state to produce the evidence. A sample motion is attached. (Note: Proposed Rule 112(a)(5),[4] SCCR, if adopted, will require the state to provide notice of intent to produce Rule 404(b) evidence.

- Whenever the state seeks the introduce Rule 404(b) evidence, counsel should move for an in camera hearing for the trial court to determine the admissibility of the proposed evidence. A sample motion to request a hearing is attached.

III. Rule 801, SCRE. Statements that are not hearsay.

A. Rule 801(d)(1)(B), SCRE: A statement is not hearsay if consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose."

In *State v. Jeffcoat*, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002), trial counsel alleged improper influence or coaching of the victim after contact with the judicial system. The Court held prior consistent statements made prior to victim's exposure to the justice system were admissible.

[4] http://www.judicial.state.sc.us/whatsnew/SouthCarolinaCriminalRulesWithRule106Change.pdf.

- **Practice tip:** The *Jeffcoat* court noted allegations of improper influence were not enough to establish admissibility of the statements. The Court reasoned, "As a prerequisite to admissibility under 801(d)(1)(B), the party offering a prior consistent statement must demonstrate the statement was made "before the alleged fabrication, or before the alleged improper influence or motive arose."

  Counsel's investigation of a sex abuse case should ***always*** include an analysis of possible motives for fabrication. Presenting a motive that arose before the victim makes otherwise inadmissible statements will prevent opening the door to this testimony.

B. Rule 801(d)(1)(D), SCRE: "A statement is not hearsay if consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident."

IV. Hearsay

A. Rule 803(2). Excited utterance.

1) *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010) ("Victim's statement to her mother related to the startling event of being sexually assaulted by Appellant immediately before her mother returned home. Victim was lying in a fetal position when her mother came to check on her minutes after arriving home. Victim was upset and crying when she told her mother about the abuse; thus, Victim made the statement while under the stress of excitement. Finally, this stress was obviously caused by the sexual assault. The requirements of Rule 803(2), SCRE were satisfied in this case.").

2) *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007). The child victim was approximately 3 ½ at the time of trial and found not competent to testify. "Within approximately 45 minutes of the victim returning to [her aunt's] house, the victim went to the bathroom and complained that her crotch area hurt when she urinated. It was discovered that the victim was bleeding, so [her aunt] laid her down in the bedroom and saw that she was red and swollen in her vaginal area. [The aunt] asked the victim what happened, and the victim said, 'Bryan did it.' The victim then stated, 'No, Bryan didn't do nothing.'"

   a) Held victim's statement to her aunt were non-testimonial and, therefore, not excluded under *Crawford v. Washington*.

   b) The Court held, "the trial court did not abuse its discretion by admitting the victim's statement as an excited utterance. Clearly, the statement related to the startling event of the victim being severely injured in her vaginal area. The

victim was complaining of pain and was bleeding when the statements were made, and thus, the victim made the declaration while under the stress of her attack. Finally, this stress obviously was caused by the startling event of the sexual assault itself." *Ladner*, 373 S.C. at 116-17 644 S.E.2d at 691.

c) In holding the statement admissible even though the victim was nt competent to testify, the Court observed, "The majority of courts that have encountered this issue have held that even though a child could be declared incompetent to testify at trial, the child's 'spontaneous declarations or *res gestae* statements' are nonetheless admissible." *Ladner*, 373 S.C. at 117 644 S.E.2d at 691.

B. Rule 803(4). Statement for purposes of medical diagnosis.

1) *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985) ("The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim. A doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses").

2) *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997) (a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim. In this case, however, the fact that Burroughs asked if he could have a hug before he assaulted the victim in no way can be viewed as "reasonably pertinent" to the victim's diagnosis or treatment).

V. Rape Shield Statute

A. The rule

1) Rule 412, SCRE provides, "In prosecutions for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence concerning the victim's sexual conduct is subject to the limitations contained in S.C. Code Ann. § 16-3-659.1 (1985)."

2) S.C. Code Ann. §16-3-659.1 provides:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16- 3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced

previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

(2) If the defendant proposes to offer evidence described in subsection (1), the defendant, prior to presenting his defense shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

B. Implicates Confrontation Clause. *Michigan v. Lucas*, 500 U.S. 145 (1991). *See also* S.C. Const. Art. 1, §14.

C. South Carolina case.

1) "We are of the opinion that the shield statute does not unduly restrict the constitutional right to cross-examination and confrontation. The legislature, by a balancing process, has attempted to consider the interests of society and prosecuting witnesses, while protecting the defendants' constitutional rights." *State v. McCoy*, 274 S.C. 70, 73, 261 S.E.2d 159, 161 (1979).

2) The "right to confront and cross examine witnesses against him and to present a full defense to the charges makes relevant evidence which tends to establish motive, bias, and prejudice on the part of the prosecuting witness." *State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (1989).

3) Exception exists for impeachment of credibility. *State v. Lang*, 304 S.C. 300, 403 S.E.2d 677 (Ct. App. 1991).

4) "We are persuaded by the decisions of the majority of jurisdictions which find that a rape shield statute or rule is not a blanket exclusion of evidence concerning alternative sources of a child victim's sexual knowledge. Therefore, in light of the *Finley* and *Lang* decisions, we hold that evidence of a child victim's prior sexual experience is relevant to demonstrate that the defendant is not necessarily the source of the victim's ability to testify about alleged sexual conduct." *State v. Grovenstein*, 340 S.C. 210, 219, 530 S.E.2d 406, 411 (Ct. App. 2000).

5) *State v. Tennant*, 394 S.C. 5, 19, 714 S.E.2d 297, 304 (2011) (S.C. Code "section 16–3–659.1 does not bar evidence of a victim's sexual conduct with a defendant, provided that such evidence is otherwise admissible. The trial court and court of appeals erred in limiting evidence of this kind to circumstances in which it is introduced to show the source or origin of semen, pregnancy, or disease.").

VI. Videotaped testimony of alleged victim.

A. The statute. S.C. Code §16-3-1550(E) provides, "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration."

B. Confrontation right.

1) SCOTUS. While finding admissible videotape testimony in *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court reasoned:

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: **The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination**; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.

2) South Carolina Supreme Court. *State v. Murrell*, 302 S.C. 77, 393 S.E.2d 919 (1990) (Under statute allowing videotaped testimony of child victim's testimony at trial in lieu of in-court testimony in defendant's presence, court must make case-specific determination of need for videotaped testimony, should place child in as close to courtroom setting as possible, and defendant should be able to see and hear child, should have counsel present both in courtroom and with him, and communication should be available between counsel and defendant).

L. South Carolina case. *The following list is not exhaustive, but provides examples of how the appellate courts will analyze the issue.*

1) Use of videotaped testimony of three-year-old criminal sexual conduct victim did not violate defendant's right of confrontation; defendant's counsel was permitted to cross-examine without limitation, defendant was able to view proceedings over closed-circuit television monitor and assist counsel in cross-examination, judge was present, and jury was able to observe victim's appearance and demeanor. *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

2) Fact that victim was hyperactive and suffered from attention deficit disorder justified allowing videotaped testimony in lieu of in-court testimony. *State v. West*, 313 S.C. 426, 438 S.E.2d 256 (Ct. App. 1993).

3) Burden not met for use of videotape. *State v. Bray*, 335 S.C. 514, 517 S.E.2d 714 (Ct. App. 1999).

4) *State v. Lewis*, 324 S.C. 539, 478 S.E.2d 861 (Ct. App. 1996)

   a) "While there is no requirement that a trial court's finding contain magic words in order to satisfy the Confrontation Clause, at a minimum, under *Craig*, a trial court should at least convey that the alternative procedure is necessary to protect a *particular* child from being traumatized by testifying in the defendant's presence. Thus, the better practice is for trial courts to be more specific in indicating the evidentiary basis supporting a ruling on necessity as to each particular child. This will enable a reviewing court to determine whether "the trial court has made the type of individualized determination of necessity required by Maryland v. Craig."

   b) "[B]ecause the trial court's finding that it was necessary to have [child] testify outside of [defendant's] presence was without evidentiary support, [defendant's] Sixth Amendment Confrontation Clause rights were violated."

Part III
Sexual Abuse Professionals

I. Qualifying experts. In *Watson v. Ford Motor Company*, 389 S.C. 434, 699 S.E.2d 169 (2010), the Court summarized the procedure for admitting expert testimony:

> The jury and the trial court each have distinct roles and separate responsibilities that they must execute during a trial. The jury serves as the fact finder and is charged with the duty of weighing the evidence admitted at trial and reaching a verdict. The trial court, on the other hand, is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. Once the trial court makes a ruling that the particular evidence is admissible, then it is exclusively within the jury's province to decide how much weight the evidence deserves. Importantly, the trial court is never permitted to second-guess the jury in their fact finding responsibilities unless compelling reasons justify invading the jury's province. *See Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 692 (1995).
>
> The admission of expert testimony is governed by Rule 702, SCRE, which provides:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. *See* Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. *See* Rules 602 and 701, SCRE.
>
> For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First,

the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 515, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements).

Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate. *See State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). It is against this backdrop that we analyze whether the trial court erred in admitting the challenged expert evidence.

II. Sexual abuse medical examinations.

A. In *State v. Cox*, 274 S.C. 624, 266 S.E.2d 784 (1980), a medical exam was conducted "to determine whether any foreign hair were present on the prosecuting witness. None were." The Supreme Court recognized, "since the test revealed no foreign hair, it was neither inculpatory nor exculpatory."

B. In *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) *abrogated on other grounds State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), discussed in Part I, Section I(B)(3)(a)(2) *supra*, the Court placed significance on the presence on corroborating medical evidence for one victim and the lack of it for another victim.

C. In *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007), discussed in Part III, Section IV(A)(1), the results of the medical exam were discussed when analyzing whether the hearsay statements qualified as admissible excited utterances.

- **Practice tips:**

  - When the medical exam is normal, the state will seek to explain why those results are still consistent with sexual abuse. Counsel should consider challenging such testimony under Watson v. Ford Motor Company, supra, because it does not assist the trier of fact and, therefore, is not reliable. Rule 702, SCRE.

  - Don't forget, counsel can seek to limit the admissibility of the alleged victim's hear say statements made for the purpose of medical diagnosis. *See* Rule 803(4), SCRE, discussed in Part III, Section IV(B), *supra*.

III. Access to alleged victim's counseling records.

A. Counselor notes are not physical or mental examinations discoverable under Rule 5. *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996).

- **Practice tip:** Counsel must ask to see the records. In *Trotter*, the trial court limited state's presentation to behavioral characteristics of incest victims. Trial court offered to get counselor's records for defense counsel to review. Since counsel did not accept offer, there was not issue for appeal. *See State v. Hughes*, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001), *infra*. A sample motion for the court to order disclosure of counseling records is attached.

B. S.C. Code Ann. §19-11-95(D)(1): "A provider shall reveal: confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding; provided, however, confidences revealed shall not be used as evidence of grounds for divorce."

C. Rule 612, SCRE and *State v. Hughes*, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001) (trial court had the authority and discretion to require production of notes used by expert witness to refresh her memory prior to trial, although notes were located outside county in which trial was being held, and trial court's error in failing to exercise its discretion was not harmless).

D. Rule 601, SCRE challenges to competency of child witness. *See In re Michael H.*, 360 S.C. 540, 602 S.E.2d 729 (2004) (counselor's Family Court testimony about possible auditory hallucinations provided basis for court ordered competency evaluation).

- **Practice tip:** Judicial economy requires access to records prior to trial, especially in General Sessions Court.

IV. Rape trauma evidence. As discussed below, South Carolina allows evidence of the physical and emotional trauma of rape. Although the evidence may be relevant, the trial

court should exclude the evidence it the prejudicial effect outweighs the probative value. *See* Rule 403, SCRE.

A. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991).

1) "[W]e hold that the testimony of [alleged victim's] mental trauma is relevant to prove the elements of criminal sexual conduct, including the lack of consent. Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred."

2) "Applying the test to the unique facts of this case, we hold that the emotional trauma evidence is unduly prejudicial and should have been excluded."

B. *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).

1) "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

2) "We find the probative value of the rape trauma evidence in this case outweighs its prejudicial effect and therefore hold it was properly admitted."

C. *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004). Rejected contention *Schumpert* is limited to child victims.

1) "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior. Nevertheless, the importance of rape trauma testimony in the case of a child victim does not negate the relevance of rape trauma evidence where the victim is an adult. The purpose of rape trauma evidence is to prove the elements of criminal sexual conduct since such evidence may make it more or less probable the offense occurred. This is true whether the victim is an adult or child." (internal citations omitted).

2) Appellant "argues the prejudicial effect of the expert testimony outweighed its probative value. Specifically, White argues [counselor] should not have been allowed to testify the victim's symptoms were consistent with those of a recent trauma sufferer. We disagree. [Counselor's] testimony is consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant's contention that the sex was consensual and to prove that a sexual offense occurred."

V. S.C. Code §17-23-175 (Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party) provides:

(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:

(1) the statement was given in response to questioning conducted during an investigative interview of the child;

(2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);

(3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and

(4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:

(1) whether the statement was elicited by leading questions;

(2) whether the interviewer has been trained in conducting investigative interviews of children;

(3) whether the statement represents a detailed account of the alleged offense;

(4) whether the statement has internal coherence; and

(5) sworn testimony of any participant which may be determined as necessary by the court.

(C) For purposes of this section, a child is:

(1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and

(2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.

(D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.

(E)(1) The contents of a statement offered pursuant to this section are subject to discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.

(2) If the child is twelve years of age or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve.

(F) Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:

(1) the necessary visual and audio recording equipment was unavailable;

(2) the circumstances surrounding the making of the statement;

(3) the relationship of the professional and the child; and

(4) if the statement possesses particularized guarantees of trustworthiness.

After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

A. Statue does not violate ex post facto clause. *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010) ("Because section 17-23-175 merely authorizes the introduction of new evidence and does not alter substantial personal rights, it does not violate the *ex post facto* laws."); *State v. Bryant*, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009) ("The admission of the previously inadmissible videotaped interviews did not change the quantum of evidence required to convict Bryant nor did it change the elements of the crime.").

B. Challenging the child hearsay exception. *So far, there are not many cases interpreting the Child Hearsay Exception, and so far the challenged have been shut out because of error preservation issues.*

1) *State v. Hill,* 394 S.C. 280, 290, (fn. 2), 715 S.E.2d 368, 374 (fn. 2) (Ct. App. 2011) ("Although Hill mentions in his brief that he challenged the constitutionality of the admission pursuant to the statute in question before the trial court, he does not argue the constitutionality of the statute itself on appeal or designate it is an argument in his statement of issues on appeal. Rather, he focuses on whether the statute's conditions were met and whether he was denied the right to confront witnesses against him by virtue of the fact that the recording was introduced into evidence through a later witness, after the child had been called to testify. Further, the trial judge did not specifically rule on counsel's argument that

the statute itself was unconstitutional. Thus, such argument would not be preserved for appeal.").

2) *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010) ("At trial, defense counsel objected to the introduction of Victim's statement as hearsay in general. The trial judge overruled the objection. Defense counsel never argued that Victim's statement went beyond the time and place of the assault as provided in Rule 801(d)(1)(D). Because this issue was not raised below, it is not preserved for appellate review.").

3) *State v. Russell*, 383 S.C. 447, 679 S.E.2d 542 (Ct. App. 2009)

   c) "Russell is correct that the admission of the videotape would likely be error in absence of the statute. Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence."

   d) "However, in this case, the legislature has made a specific allowance for these out-of-court statements by child victims provided certain elements are met. In this case, Russell does not argue the requirements were not met. In essence, Russell argues the statute itself, under any circumstances, permits improper corroboration or bolstering in conflict with the South Carolina Rules of Evidence. However, the South Carolina Rules of Evidence expressly acknowledge the superiority of statutes in such cases: *"Except as otherwise provided by rule or by statute,* [the South Carolina Rules of Evidence] govern proceedings in the courts of South Carolina...." Rule 101, SCRE (emphasis added). Therefore, Russell's argument, although well-made, must fail."

   e) "At oral argument, Russell attempted to ground his improper bolstering argument in the constitutional protections afforded by the Sixth Amendment of the United States Constitution. However, no constitutional argument was raised in Russell's appellate brief. The issue is therefore not preserved for our review."

   f) "The State suggests Russell's argument is not properly preserved. At trial, Russell argued the videotape lacked probative value because it was cumulative of Child's trial testimony. On appeal, Russell also argues the videotape is prejudicial because Child is seen drawing a card for his mother and "playfully interacting with the counselor," thereby stirring the emotions of the jurors. We find Russell's argument regarding Child's interaction with the counselor is not preserved for our review. *See State v. Freiburger,* 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved when one ground is raised to the trial court and another ground raised on appeal). Furthermore, while the videotape of Child's interview may have been cumulative to his testimony at trial, it was highly probative to the question of

Russell's guilt or innocence. Therefore, we find any prejudice to Russell was outweighed by the probative value of the videotape.

- **Practice tips: Admission of statements pursuant to this statute could be extremely powerful evidence and determine the outcome of the trial. Counsel should challenge such evidence. Consider the following:**

  - Cases declining to address challenges because of error preservation issues can serve as models for challenging the statute in future cases. Consider calling the appellate defender involved in the prior case(s).

  - Attached is a response to the states motion to admit statements pursuant to the statue. So far, this motion has not been persuasive on the merits. However, there is some reason to think judges are reluctant to admit such evidence in the face of a constitutional challenge. A strong attack of the evidence might lead to the judge substantially limiting the state's use of the evidence.

  - Use as many arguments as possible to limit the scope of the statements admitted. These interviews contain questioning about matters not relevant to the trial.

  - Ambiguous issues under the statute:

    1) Does the statue automatically provide for the admission of the video or rather testimony about the statements made to the interviewer? Counsel could argue the video requirement is merely to preserve the statements to protect the defendant's ability to know what the child actually said.

    2) If the child is under 12 and the time of the statement but has turned 12 since the interview, then does the statute still apply? Even prosecutors seem to have a different view of this issue. In appropriate cases, defense counsel should make the appropriate challenge until our Supreme Court addresses the issue.

VI. Qualification as expert of professionals interviewing the child.

A. *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) ("We find the testimony given by [forensic interviewer trained in RATAC method] simply was not required to be presented by an expert witness. [The interviewer] testified only as to her personal observations and

experiences, and her interview with the Victim in this case. Accordingly, we find it was unnecessary for the trial court to have qualified her as an expert.").

- **Practice tip:** Beware of future attempts to qualify forensic interviewers as experts. In footnote, the Court lists other states that have qualified such experts and observed, "Although there may be a case in which qualification of an expert in this field is proper, we find no such necessity in the present case. Counsel can challenge the testimony under *Watson v. Ford Motor Company*, discussed in Section 1, *supra*. Note: The Court cited *Douglas* in *Watson v. Ford Motor Company*.

B. *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (overruling *State v. Morgan,* 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997)) ("Nonscientific expert testimony must satisfy Rule 702[, SCRE], both in terms of expert qualifications and reliability of the subject matter.").

C. *State v. Henry*, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997) ("[A] psychotherapist with a specialty in child sexual abuse as an expert witness [is qualified] to give opinion testimony in regard to the diagnosis of PTSD.").

VII. Witnesses are never allowed to testify they believe the alleged victim or otherwise bolster the alleged victim's credibility.

A. Supreme Court Cases.

1) *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (Held: (1) error in admitting portions of forensic interviewer's written reports from interviews with alleged minor victims which were inadmissible hearsay was not harmless, and (2) error in admitting portions of forensic interviewer's written reports that contained improper vouching was not harmless.).

2) *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (J. Pleicones dissenting). While the majority concluded the testimony did not vouch for the alleged victim's credibility, the dissent disagreed and would have found prejudice: "As in many CSC cases, this case turned primarily on the veracity of the victim. In the instant case, while physical evidence indicated that the victim had been abused, no physical evidence other than the testimony of the victim connected Petitioner to the crime."

   - **Practice tip:** Whenever possible, allege prejudiced based on either (1) lack of evidence corroborating a crime took place (*E.g.* lack of medical evidence) or (2) lack of evidence connecting defendant to the crime.

3) *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (psychiatrist's testimony that alleged victim's "symptoms are genuine" improperly vouched for alleged victim's credibility."

- **Practice tip:** *State v. White*, 353 S.C. 566, 578 S.E.2d 728 (Ct. App. 2003) *affirmed as modified* 361 S.C. 407, 605 S.E.2d 540 (2004).

  - **Error preservation – Be sure to object.** The Court of Appeals was asked to address testimony from a counselor who testified "she believed the victim's account of events." The Court declined to address the issue and concluded, "Although this testimony may have exceeded the proper boundaries of expert testimony regarding post-traumatic stress and sexual abuse under *State v. Dawkins,* 297 S.C. 386, 377 S.E.2d 298 (1989) and its progeny, we find this issue is not preserved for our review as White's attorney failed to object to this testimony when it was elicited during trial."

  - **Don't open the door.** On appeal, the Supreme Court held, White "opened the door to this testimony by cross-examining [counselor] as to whether she had cases in which she did not believe the alleged victim."

B. Court of Appeals Cases.

1) *State v. McKerley,* 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (Held: (1) specific testimony of forensic interviewer who conducted interviews with complainant, stating that "both interviews that I conducted with her, I found them to be compelling for sexual abuse[,]" was inadmissible; (2) forensic interviewer's general testimony indicated belief in complainant's truthfulness and was thus inadmissible; and (3) erroneous admission of testimony of forensic interviewer was not harmless.).

   - **Practice tip:** Because *McKerley* follows well-settled law, its significance is not an advance in the law but rather its describing specific testimony indicating the interviewer "believes the story told by the victim." *Id*. 397 S.C. at 467, 725 S.E.2d at 143.

2) *State v. Hill*, 394 S.C. 280, 295, 715 S.E.2d 368, 376-77 (Ct. App. 2011) ("[T]he forensic interviewer never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony.").

3) *South Carolina Dept. of Social Services v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008) (testimony of therapist indicating "Child gave a consistent disclosure and that as a result of that conclusion she recommended therapy" improperly bolstered Child's credibility).

4) *State v. Dempsey,* 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony from a child abuse counselor that child tells the truth 95% to 99% percent of time abuse is alleged improperly vouches for child's credibility).

Part IV
Collateral Consequences of a Sex Offense Conviction

Recently in Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473 (2010), the Supreme Court of the United States held counsel ineffective for failing to advise a client about the immigration consequences of a guilty plea. Some might view the holding in Padilla to be narrow because the case involved an immigrant who was in the country legally and counsel's failure to advise about the immigration consequences led to deportation consequences. More significantly, the Court reaffirmed American Bar Association Criminal Justice Standards[5] and the National Legal Aid and Defender Association for Performance Guidelines for Criminal Representation[6] are evidence of the prevailing profession standards.

"[D]efense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." ABA Criminal Justice Standards, Guilty Pleas §13-3.2(f). See also NLADA Performance Guidelines for Criminal Representation §6.2(a).

Introduction

South Carolina Sex Offender Registry has Become More Punitive

When South Carolina first enacted a sex offender registry in 1994, the legislative intent was "to promote the State's fundamental right to provide for public health, welfare and safety of its citizens." 1994 Act 497, Part II §112A (S.C. Code §23-3-400). The registry was "not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws." *Id*. "[T]he General Assembly . . . intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes. Hence, the language indicates the General Assembly's intention to create a non-punitive act." *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Sex Offender registration in South Carolina is lifetime. 1994 Act 497, Part II §112A (S.C. Code §23-3-460). *See also Hendrix v. Taylor*, 353 S.C. 542,

[5] http://new.abanet.org/sections/criminaljustice/Pages/Standards.aspx.

[6] http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

579 S.E.2d 320 (2003) (since sex offender registration is non-punitive, no liberty interest is implicated regardless of the length of time registration is required).

Initially, the Sex Offender Registry applied only to "convictions," and not juvenile adjudications. 1994 Act 497, Part II §112A (S.C. Code §23-3-430). *See State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001) (a juvenile adjudication is not the same as a conviction). When the General Assembly began requiring juveniles adjudicated of certain offenses to register as sex offenders, the juvenile's information remained confidential. 1996 Act 444 §16 (S.C. Code §23-3-430, 490). It wasn't until 1998 that the General Assembly authorized release of juvenile sex offender information under certain circumstances. 1998 Act 384 §1 (S.C. Code §23-3-490). This Court has held requiring a juvenile to register as a sex offender does not violate due process, at least in situations where the juvenile's "registry information will not be made available to the public because of appellant's age at the time of his adjudication." *In re Ronnie A.*, 355 S.C. 407, 410, 585 S.E.2d 311, 312 (2003).

Since this Court's decisions in *Walls, Hendrix, and Ronnie A.* in 2002 and 2003, South Carolina's Sex Offender Registry has become punitive. In 2005, the General Assembly began requiring lifetime GPS monitoring for an offender convicted or adjudicated delinquent of certain offenses, including lewd act and CSC with a minor, 1st degree. 2005 Act 141 §8 (S.C. Code §23-3-540).

Also in 2005, the General Assembly began restricting residency by prohibiting sex offenders "from living in campus student housing at a public institution of higher learning supported in whole or in part by the State." 2005 Act 94 §2 (S.C. Code §23-3-465). In 2008, the General Assembly prohibited sex offenders convicted of certain offenses from residing "within one thousand feet of a school, daycare center, children's recreational facility, park, or public

playground." 2008 Act 333 §1 (S.C. Code §23-3-535). The General Assembly expressly declared residency restrictions to be "penalties." S.C. Code Ann. § 23-3-535(E)(1).

When the General Assembly added lifetime GPS monitoring and residency restrictions, it did not reaffirm the civil intent of the Registry. Indeed, they have acted to the contrary.

- **Practice Tip:** Although the sex offender registry has traditionally been considered civil, counsel should argue that certain aspects of the registry, such as residence restriction requirements and lifetime GPS, are punitive.

I. Sex offender registry. S.C. Code §23-3-400 *et. seq.*

A. S.C. Code §23-3-430(C) lists the offenses that require registration following conviction, adjudication, or finding of not guilty by reasons of insanity.

> Registration is required for similar convictions in other states. *Lozada v. South Carolina Law Enforcement Div.*, 395 S.C. 509, 719 S.E.2d 258 (S.C.,2011) (held that petitioner's conviction in Pennsylvania for unlawful restraint was sufficiently similar to conviction in South Carolina for kidnapping as to require petitioner to register as a sex offender in South Carolina).

B. S.C. Code §23-3-450 and 460 contains the registration requirement.

C. S.C. Code §23-3-465 provides, "Any person required to register under this article is prohibited from living in campus student housing at a public institution of higher learning supported in whole or in part by the State."

D. S.C. Code §23-3-470 sets forth the penalties for failure to register.

Notice of requirement to register:

a) *State v. Binnarr*, (S.C. S. Ct. Op. No. 27122) (Filed May, 9, 2012) 2012 WL 1609071 ("to comport with due process, a defendant must have actual notice of the sex-offender reporting requirements before he can be convicted of violating the statute requiring a sex offender to register").

b) *State v. Latimore*, 397 S.C. 9, 723 S.E.2d 589 (2012) (held that any due process violation inherent in failure to inform defendant of additional re-registration requirement imposed by statutory amendment was harmless).

E. S.C. Code §23-3-475 makes it illegal to provide false information when registering and provides penalties.

F. S.C. Code §23-3-490 provides for public inspection of the sex offender registry.

G. S.C. Code §23-3-500 provides, "A court must order that a child under twelve years of age who is convicted of, pleads guilty or nolo contendere to, or is adjudicated for an offense listed in Section 23-3-430(C) be given appropriate psychiatric or psychological treatment to address the circumstances of the offense for which the child was convicted, pled guilty or nolo contendere, or adjudicated."

H. S.C. Code § 23-3-535 provides for limitation on places of residence of certain sex offenders; exceptions; violations; local government ordinances; school districts required to provide certain information.

I. **Lifetime GPS monitoring.** S.C. Code §23-3-540 provides for mandatory, lifetime GPS monitoring for people convicted of CSC with a minor first degree and lewd act. This section also provides the trial judge has the discretion to order lifetime GPS monitoring for other offenses. The section also provides for GPS monitoring for violations of probation, parole or community supervision if the original offense was committed before the effective date of this requirement.

a) *State v. Dykes*, (S.C. S.Ct. Op. No. 27124) (Filed May 9, 2012) 2012 WL 1609451 (Rehearing granted July 12, 2012) (In a concurring opinion by Justice Kittredge, which was the controlling opinion in the case, the Supreme Court held that a statutory provision that mandates lifetime satellite monitoring of certain child sex offenders without judicial review related to an assessment of an individual's risk of reoffending violates the Due Process Clause.).

- **Practice tips:**

  - **The Supreme Court reheard this case on September 18, 2012.**

  - **The underlying facts in the case involved the mandatory addition of GPS monitoring following a revocation of probation. There were a number of other issues, including an *ex post facto* challenge, briefed that the Court never addressed. Advocates should look for opportunities to expand on the holding in this case.**

  - **Advocates should be familiar with the practical requirements of GPS monitoring. Fees are expensive. The device has to be charged for hours each day (not unlike a cell phone).**

M. Removal from Sex Offender Registry

1) *Edwards v. State Law Enforcement Div.,* 395 S.C. 571, 720 S.E.2d 462 (2011) (amendments to the sex offender registry statute to provide that if a sex offender received a pardon for which he was required to register, he must reregister and may not be removed from the registry except in certain enumerated circumstances could not be applied retroactively to sex offender.

2) *In re Shaquille O'Neal B.*, 385 S.C. 243, 684 S.E.2d 549 (2009) (the family court had jurisdiction to hear juvenile's motion that sought to remove his name from the South Carolina Sex Offender Registry).

3) *Hazel v. State*, 377 S.C. 60, 659 S.E.2d 137 (2008) (Court of Common Pleas had jurisdiction to make findings as to whether offense included sexual misconduct).

4) *Wiesart v. Stewart*, 379 S.C. 300, 665 S.E.2d 187 (Ct. App. 2008) (held that the amended statute retroactively applied to entitled offender to a hearing to determine whether prior indecent exposure incident required him to continue to register).

II. DSS central registry for people who abuse and neglect children. S.C. Code § 17-25-135 provides for entry of sex offenders on Central Registry of Child Abuse and Neglect upon conviction of certain crimes. The section provides:

> (A) When a person is convicted of or pleads guilty or nolo contendere to an "Offense Against the Person" as provided for in Title 16, Chapter 3, an "Offense Against Morality or Decency" as provided for in Title 16, Chapter 15, criminal domestic violence, as defined in Section 16-25-20, criminal domestic violence of a high and aggravated nature as defined in Section 16-25-65, or the common law offense of assault and battery of a high and aggravated nature, and the act on which the conviction or the plea of guilty or nolo contendere is based involved sexual or physical abuse of a child, the court shall order that the person's name, any other identifying information, including, but not limited to, the person's date of birth, address, and any other identifying characteristics, and the nature of the act which led to the conviction or plea be placed in the Central Registry of Child Abuse and Neglect established by Subarticle 13, Article 3, Chapter 7, Title 63. The clerk shall forward the information to the Department of Social Services for this purpose in accordance with guidelines adopted by the department.
>
> (B) For purposes of this section:
>
> > (1) "Physical abuse" means inflicting physical injury upon a child or encouraging or facilitating the infliction of physical injury upon a child by any person including, but not limited to, a person responsible for the child's welfare, as defined in Section 63-7-20.
> >
> > (2) "Sexual abuse" means:
> >
> > > (a) actual or attempted sexual contact with a child; or
> > >
> > > (b) permitting, enticing, encouraging, forcing, or otherwise facilitating a child's participation in prostitution or in a live performance or photographic representation of sexual activity or

sexually explicit nudity; by any person including, but not limited to, a person responsible for the child's welfare, as defined in Section 63-7-20.

II. Sexually violent predator commitments. S.C. Code §44-48-10, *et seq*. provides for civil commitments for sexually violent predators. The Act provides for screening of inmates who potentially qualify as sexually violent predators before release from SCDC. If the state seeks the civil commitment, the Act provides for appointment of counsel, expert services, and a jury trial. If committed, the civil commitment continues for treatment until the person is no longer considered a threat.

III. No parole offenses and community supervision.

A. S.C. Code §23-13-100 defines, "For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.

B. S.C. Code §23-13-150 requires service of 85% of most no parole sentences. (Note: there are a few offenses that require service of 100% of the sentence.)

C. S.C. Code §24-21-560 requires people released from a no parole sentence to participate in the two year community supervision program administered by SCDPPPS.

IV. Serious, most serious, and life without parole. S.C. Code §17-25-45 defines "most serious" and "serious" offenses and provides for a life sentence for two convictions of "most serious" offenses and three "serious" convictions.

Part V
The Prosecution Strategy

The Child Sexual Abuse Accommodation Syndrome

The prosecution of child sexual abuse cases is based on the Child Sexual Abuse Accommodation Syndrome (hereinafter "CSAAS"). This prosecution theory originated with Ronald C. Summit's 1983 article entitled "The Child Sexual Abuse Accommodation Syndrome," published in the *Child Abuse and Neglect Journal*. Prosecution witnesses use the CSAAS to explain away problems with the victim's testimony. Typical prosecution testimony includes delayed disclosure, partial disclosure, and continued disclosure.

Consider two methods of challenging this type of testimony. First, Dr. Summit published an article in 1992, entitled "Abuse of the Child Sexual Abuse Accommodation Syndrome" that explained how his theory was being improperly used in courtrooms. Second, the CSAAS has not been validated by scientific research. *See* London et. al., "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways Children Tell?" 2005, and London *et. al*., "Review of Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviews," 2008. These documents point out that some of the forensic interviewing testimony does not require expert opinion while other types of the testimony are the subject of expert opinion but the "science" has not been validated. CSAAS testimony, therefore, should be analyzed under the first and third prong of *Watson v. Ford Motor Company*. *See* Part III, Section I, *supra*.

The Prosecutions Playbook

In June 2003, the American Prosecution Research Institute, which is an affiliate of the National District Attorneys Association, published *Finding Words: Half a Nation by 2012 – Interviewing Children and Preparing for Court* (found at http://www.ndaa.org/pdf/finding_words_2003.pdf (last viewed September 15, 2012)). This document outlines a plan for state's to adopt the forensic interviewing techniques. In 2001, South Carolina was one of the first states to adopt the strategy. *Finding Words*, p. 20. South Carolina now refers to Finding Words as Child First.

In South Carolina, The Children's Law Center provides resources for prosecutors and child sexual abuse professionals. Every lawyer defending a child abuse case should be familiar with *Prosecution of Child Abuse in South Carolina: A Manual for Solicitors and Investigators*, Fithth Edition (December 2011) (found at http://childlaw.sc.edu/frmPublications/ProsecutionManualDec2011.pdf (last viewed September

15, 2012)). This manual outlines the prosecution of child sexual abuses cases, even to the point of providing sample direct examinations of the state's expert witnesses.

Other prosecution resources for prosecution of child sexual abuse cases can be found on The Children's Law Center's website (found at http://childlaw.sc.edu/childabuse.asp?parentCatID=21&catID=403 (last viewed September 15, 2012).

These prosecution resources can be used as pre-trial exhibits when arguing motions to limit or exclude prosecution child sexual abuse expert testimony.

Part VI
Sample Motions

The following documents are sample motions. These samples are intended to be reference for trial counsel when preparing for trial. Counsel should review rules, statutes and cases cited in the motion and conduct additional research. In addition, counsel should customize the motion to the individual case.

When preparing any pre-trial motion, counsel should remember the ultimate audience for the pleading is the appellate court. In fact, in situations where counsel anticipates the trial judge denying the motion, the primary objective should be developing a record for appellate review.

Please Note: Because these motions have been combined into one Word document with the rest of the materials, the footnotes in the motions continue in order following the footnotes in the main text.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
	)	
THE STATE	)	Case Number:
	)	
v.	)	
	)	Objection to state's motion for defendant to disclose
	)	notice of alibi defense and motion to require a more
_____,	)	definite and certain request for notice of alibi
Defendant	)	defense
_____	)	

Please take notice that the defendant objects to the state's motion to disclose an alibi defense on the grounds that that state has not properly complied with the requirements of Rule 5, SCRCrimP.

In addition, please take notice that the defendant will move before the presiding judge of the Eighth Judicial Circuit for an order requiring the state to make a more definite and certain request for a notice of alibi defense.

The defendant submits the following memorandum in support of this objection and this motion.

Procedural and Factual Background

By motion dated [********insert date***********], the state moved for the defendant to notice an alibi defense. The motion requested an alibi notice for the following:

[*insert exact language from state's motion***]**

This request does not properly identify specific time, date, and place of the alleged offense.

Argument

Rule 5(e)(1) of the South Carolina Rules of Criminal Procedure provides, in part:

> Upon written request from the prosecution stating the time, date, and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense.

The defendant has a fundamental right "to be informed of the nature a cause of the accusations." U.S. Const. Am. VI and XIV. *See also* S.C. Const. Art. 1, §§11 and 14. Furthermore, due process requires that the defendant be given adequate notice of the charges and the date, time and place that he is alleged to have committed the crime. *See* U.S. Const. Am. V and XIV, S.C. Const. Art. 1, §3. Before an accused can be required to give notice of an alibi defense, the state must give real notice of the date, time and place of the alleged crime. Otherwise, an accused would never know how to respond. In this case, the state has failed to provide any meaningful notice.

Rule 5(e)(1) contemplates the state providing particularized notice of the date time, and place of the alleged crime. In many ways, this requirement is simple. Law enforcement investigated the alleged crime. The state has to prepare an indictment to present to the Grand Jury. Both law enforcement and the Solicitor's office have requirements to maintain contact with the alleged victim at various stages of the case. The state is in the position to obtain this information and provide it to the defendant in a timely manner prior to trail.

The defendant, furthermore, has fundamental rights to a fair trial and to effective representation by an attorney. U.S. Const. Am. V, IV, and XIV and S.C. Const. Art. 1, §§3 and 14. The defendant cannot have a fair trial if the State refuses to disclose this information in sufficient time for the information to be useful to the defendant and defense counsel. An attorney cannot investigate an allegation, respond to a notice of alibi defense, prepare a defense,

and effectively represent a client at trial without being provided complete and accurate information by the state.

Conclusion

For the foregoing reasons, the defendant objects to the state's request for a notice of alibi defense. In addition, the court should require the state to clarify its request for notice of alibi defense before the defendant is required to respond.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
	)	
THE STATE	)	Case Number:
	)	
vs.	)	
	)	Motion for state to disclose Rule 404(b), SCRE
	)	(*Lyle*) evidence
_____,	)	
Defendant	)	
_____	)	

The defendant move for an order requiring the state to disclose any evidence the state intends to introduce at trial pursuant to Rule 404(b), SCRE. *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

Although South Carolina did not adopt as part of Rule 404(b) a notice requirement that is similar to the notice requirement contained under Rule 404(b), FRE it was not necessary to adopt such a requirement because of the already existing South Carolina Rules of Criminal Procedure. Rule 5(a)(1)(C), SCRCrimP requires the State to disclose all documents, tangible objects, and reports of examinations and tests "which are material to the preparation of [the] defense or are intended for use by the prosecution as evidence in chief at the trial."

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2002
Greenwood, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	))	IN THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	Case Number:
VS.	)	
_____, Defendant	)	Motion for *in camera* hearing to determine admissibility of Rule 404(b), SCRE evidence

The defendant moves the Court for an *in camera* hearing to determine admissibility of Rule 404(b), SCRE evidence. Rule 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

Based on the state's motion for admission of unrecorded out of court statements of child pursuant to S.C. Code Section 17-23-175(F), the defendant is concerned the state might try to introduce evidence of other crimes, wrongs or bad acts that are part of the indictment in this case. "To be admissible, other crimes that are not the subject of conviction must be proved by clear and convincing evidence." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). *See also* Rule 403, SCRE.

If the Court determines the evidence to be admissible as an exception to Rule 404(b), "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000).

In order to satisfy the clear and convincing standard and to weigh the probative value of the evidence against the danger of unfair prejudice, live testimony is required. The defendant

requests the court to inquire of the state whether the state intends to introduce evidence of other crimes, wrongs, or bad acts. If so, then the defendant requests an *in camera* hearing where the Court can take testimony, hear the arguments of counsel, and make the appropriate rulings.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE	)	
	)	
THE STATE	)	Case Number:
	)	
vs.	)	
	)	Motion to require disclosure of alleged victim's
	)	counseling records
_____,	)	
Defendant	)	
_____	)	

Pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S. 83 (1963), *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), the Fifth, Sixth, and Fourteenth Amendments of the Unites States Constitution, and Art. 1, §§3 and 14 of the South Carolina Constitution, the defendant moves for an order requiring disclosure of counseling records and any other mental health records of the alleged victim.

Typically, law enforcement or the Solicitor's Office refers the alleged victim of sexual abuse to a counselor. The State gets an opinion from the counselor and often wants to use the counselor in court as an expert witness. Yet, the State, although seemingly having access to any information it wants from the counselor, does not obtain and disclose these records. While S.C. Code §10-11-95 establishes a privilege, this section also provides an exception to the privilege. Section 19-11-95(D)(1) provides, in part:

> A provider shall reveal confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding.

These records are needed for several reasons.[7] First, the defendant should have access to the same information that law enforcement and the Solicitor's office have access to in investigation and preparing the case for trial. Second, the defendant should have access to the information in order to learn of any inconsistent statements made to the counselor. Third, the defendant should have access to the notes of the counselor in order to determine if the examiner used appropriate techniques. Fourth, the defendant should have access to the information in order to determine if the child has been abused by another individual and that such abuse may be the source of the child's symptoms. Fifth, the defendant should have access to the information in order to determine if there is another cause for the child's symptoms and whether the counselor has investigated that possibility. Sixth, the absence of rape trauma symptoms is evidence that makes the alleged assault less probable.

The defendant contends that the requested information is material to the defense and should be produced prior to trial in order that counsel for the defendant can adequately and effectively prepare a defense. If the State objects to producing one or more of the requested items, then the defendant requests a hearing, prior to trial, before the chief administrative judge.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

[7] In addition, the defendant needs the records in order to determine whether or not to request a competency evaluation of the alleged victim. *See In re Michael H.*, 360 S.C. 540, 602 S.E.2d 729 (2004).

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	))	IN THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	Case Number:
v.	)	
_____, Defendant	)	Motion to Compel Information about the Alleged Victim's Disability

Pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S. 83 (1963), Kyles v. Whitley, 115 S.Ct. 1555 (1995), the Fifth, Sixth, and Fourteenth Amendments of the Unites States Constitution, and Article I, §§ 3 and 14 of the South Carolina Constitution, the defendant moves that the State produce information about the alleged victim's disability.

Counseling records of the alleged victim produced last week contain a letter dated April 2, 2007 to a disability examiner for South Carolina Vocational Rehabilitation. A copy of this letter is attached. The defendant contends that the requested information is material to the defense and should be produced prior to trial in order that counsel for the defendant can adequately and effectively prepare for the alleged victims competency hearing.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE	)	
	)	
THE STATE	)	Case Number:
	)	
vs.	)	
	)	Motion to exclude testimony of the alleged
	)	victim for lack of competency to testify, or
_____,	)	in the alternative, for the court to order a
Defendant	)	competency evaluation
_____	)	

The defendant moves the Court for order excluding the testimony of the alleged victim for lack of competency to testify. The defendant relies on Rule 601, SCRE and *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998).

In the alternative, pursuant to *In re Michael H.*, 360 S.C. 540, 602 S.E.2d 729 (2004), the defendant moves for the Court to appoint a Child Forensic Psychiatrist to conduct an independent examination for competency and to report the findings directly to the Court.

The defendant requests a hearing on this motion.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
COUNTY OF ABBEVILLE	)	GENERAL SESSIONS
	)	
STATE OF SOUTH CAROLINA	)	Case Number:
	)	
VS.	)	DEFENDANT'S OPPOSITION TO
	)	STATE'S MOTION FOR COMPETENCY
_____,	)	EVALUATION OF CHILD TO BE
DEFENDANT.	)	CONDUCTED OUTSIDE THE PRESENCE
_____	)	OF THE DEFENDANT

The defendant opposes the State's motion for competency evaluation of child to be conducted outside the presence of the defendant and requests that the Court not exclude him from the competency proceedings.

Argument

Defendant should be allowed to be present at the hearing to determine the competency of child for the following reasons: (1) despite the State's contention, it is likely that the hearing could result in presentation of substantive evidence, since there are inconsistencies in the child's statements concerning the alleged abuse that could be inquired into in determining her competency; (2) the State's request for a book or Kleenex box to be placed in front of the child during her trial testimony belies the assertion that testifying at her competency hearing would cause her undue hardship, stress, and trauma; (3) as the father of the child, defendant's presence is necessary to assist his counsel in determining whether the child is telling the truth if asked about historical events that occurred when the child lived with her father; and (4) even if defendant is excluded from being present when the child testifies during the competency hearing, there are likely to be other witnesses called during the hearing and there is no basis for defendant to be excluded from the hearing when other witnesses are testifying.

First, the holding of *Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658 (1987) is premised on the finding that the competency determinations of the children involved did not violate defendant's rights of confrontation or due process in part because no substantive evidence was elicited during the competency hearing. In *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991), which relied on *Stincer*, the South Carolina Supreme Court noted appellant's argument that allegations of abuse were discussed during the competency hearing, but the court did not consider that argument because it was not preserved for appeal. In this case, it is likely that substantive

evidence could be elicited during the competency determination due to inconsistencies in the child's prior statements concerning the alleged abuse. In that event, defendant's trial rights are triggered and he should be allowed to be present.

Second, the State alleges as grounds for its motion that "seeing the Defendant, who is the child victim's father, will cause undue hardship, stress, and trauma to the child victim." Before the court elects to exclude the defendant from the competency hearing, defendant requests that the court require the State to present expert testimony in support of this allegation. Furthermore, these grounds for exclusion of the defendant are undercut by the State's motion for special procedures to prevent child from being face-to-face with defendant, in which the State asserts that the issue of hardship to the child can be mitigated by obscuring the child's view of the defendant (and defendant's view of the child) by placement of a book or Kleenex box on the ledge of the witness stand. If this provision can cure the issue of hardship to the child during her trial testimony, it should also be sufficient to cure the issue during her testimony at the competency determination.

Third, defendant's rights of due process and effective assistance of counsel would be violated by his exclusion from the competency hearing because he lived with the child for the eight years prior to the allegations being made and is in a position to assist his counsel by providing confirmation about testimony of a historical nature. Defendant's knowledge of the child's background would assist his counsel and the court in asking questions designed to aid in a competency determination. The Court in *Stincer* acknowledged that on the record it considered, the respondent did not present "evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency"; therefore, the Court could not say that his due process rights were violated by exclusion from the hearing. *Id.* at 747, 107 S.Ct. 2668. In contrast, Defendant here asserts that he can be of assistance if present and that he would be denied due process and effective assistance of counsel if excluded from the hearing.

Finally, even if the court elects to exclude Defendant from the portion of the competency hearing in which the child testifies, there is no allegation of any need for Defendant to be absent from the entire competency

hearing. Defendant expects other witnesses to be called during the hearing and requests that he be present during their testimony and not be excluded from the entire hearing.

Conclusion

For the foregoing reasons, Defendant requests that he be allowed to be present during the hearing to determine the child's competency. Alternatively, if the court finds Defendant should not be present in the courtroom while the child testifies during the competency hearing, Defendant requests that he be allowed to attend the remainder of the hearing.

Respectfully submitted,

_____
E. Charles Grose, Jr.

Janna A. Nelson

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	))	IN THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	Case Number:
v.	)	
_____, Defendant	)	Written Objection to Qualifying the Person Conducting the Interview of the child as an Expert

The defendant objects to the state qualifying as an expert witness anyone who conducted an interview with the alleged victim as part of the investigation of this case. In *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), the Supreme Court held "it was unnecessary for the trial court to have qualified her as an expert." *Id*. 380 S.C. at 503, 671 S.E.2d at 608. The Court reached this conclusion because the interviewer "only as to her personal observations and experiences, and her interview with the Victim in this case." *Id*. 380 S.C. at 502-3, 671 S.E.2d at 608. "Ultimately, [the interviewer] testified that based on the interview, it was her opinion the victim needed to go to the Durant Center for a medical exam." *Id*. 380 S.C. at 502, 671 S.E.2d at 608.

In this case, the so-called "forensic interviewer" did not even opine the alleged victim needed a medical exam. An exam had already taken place, and a second exam was scheduled prior to the interview. The Court, therefore, should not qualify this interviewer, or any other interviewer, as an expert witness.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF GREENWOOD	)	IN THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	2005-GS-24-1386
v. _____, DEFENDANT.	)	Motion to Reserve Cross-examination of the Alleged Victim Until After the State Presents S.C. Code Section 17-23-175 Evidence

The defendant moves the Court to allow him to reserve cross-examination of the alleged victim about the out-of-court statement until after the state presents the S.C. Code Section 17-23-175 evidence. This motion does not waive the objection to the admissibility of the evidence. Rather, this motion applies only if the Court overrules this objection.

In another case prosecuted in this judicial circuit,[8] the state moved to admit two videotaped interviews of the alleged victim. On the state's motion, the Court conducted a hearing, reviewed over two hours of videotape, received transcripts of the interviews, conducted a follow up hearing, and ruled the state must identify the specific portions of the interviews it intended to introduce at trial. The state identified the portions of the interview it wanted to introduce, and the defendant in that case was given an opportunity to respond. At trial, the state never sought to introduce the evidence.

The defendant understands every litigant has to make strategic decisions about what evidence to admit. The defendant, therefore, moves the court not to require him to cross-examine the alleged victim about the out of court statements until the state actually introduces the evidence. Section 17-23-175(A)(3) requires "the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement."

[8] *State v. Jimmy Paul McKerley*, Abbeville County case numbers 2006-GS-01-408 and 409.

The defendant proposes the following procedures. First, in order to ensure the child testifies at the hearing, the child must testify about the elements of the crime before any evidence of the out-of-court statement is admissible. Once the state completes the direct examination, the defendant would cross-examine the child about the elements of the crime. At the end of the cross-examination about the elements of the crime, cross-examination about the making of the out-of-court statement would be reserved until the state actually presents evidence of such a statement. If the state decides not to present the evidence, then the cross-examination would not need to be continued. If the state decides to present evidence of the out-of-court statement, then the alleged victim would return to the witness stand for the balance of the cross-examination.

The defendant acknowledges this is an unusual procedure. Section 17-23-175, however, is an unusual procedure that applies in very limited situations. In essence, it is a new rule of evidence. The special rule of evidence mandates a special procedure. The state might argue the defendant could recall the alleged victim in his case in chief. Section 17-23-175, however, guarantees the defendant will be allowed to cross-examine the alleged victim about the statement. Since the defendant objects to the admissibility of the out-of-court statement, he should not be required to cross-examine about the statement until the state actually introduces the statement.

IT IS SO MOVED.

Respectfully Submitted,

_____
E. Charles Grose, Jr.

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF
COUNTY OF ABBEVILLE	)	GENERAL SESSIONS
	)	
STATE OF SOUTH CAROLINA	)	Case Number:
	)	
VS.	)	DEFENDANT'S OPPOSITION TO
	)	STATE'S MOTION FOR ADMISSION
_____,	)	OF OUT-OF-COURT STATEMENTS
Defendant	)	OF CHILD PURSUANT TO S.C. CODE
_____	)	SECTION 17-23-175

The defendant opposes the State's motion for admission of out-of-court statements of child pursuant to S.C. Code Sec. 17-23-175.

Argument

I. S.C. Code Sec. 17-23-175 is unconstitutional in that it violates the Confrontation Clause of the Sixth Amendment to the United States Constitution as interpreted by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

S.C. Code Sec. 17-23-175 was enacted in 2006 and its constitutionality has never been tested in the South Carolina courts. The requirements of the statute for admission of the videotaped forensic interviews in this case are in direct conflict with the provisions of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), and the statute therefore violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.[9] In *Crawford*, the Court discussed the admissibility of out-of-court hearsay statements of a witness and concluded that the right of confrontation is violated by admission of such statements except in very limited circumstances. Those limited circumstances for admission of such statements exist **only** when the witness is unavailable, when the out-of-court statements are considered testimonial, and the defendant had a prior opportunity for cross-examination of the witness. *Id.*

[9] The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

at 68, 124 S.Ct. 1374. In contrast, S.C. Code Sec. 17-23-175 allows admission of out-of-court hearsay statements if they were made in response to questioning conducted during an investigative forensic interview of the child (making the statements testimonial) **and** when the child is available for testimony and cross-examination at trial. S.C. Code Sec. 17-23-175(A)(1), (A)(3). The requirement that the child be available for testimony directly contravenes the *Crawford* requirement that the witness be unavailable before out-of-court hearsay statements can be admitted.

The *Crawford* case interprets the Confrontation Clause to be violated when out-of-court testimonial hearsay statements of an **available witness** are admitted. In this case, the State admits in its motion that it expects the child to testify at trial and be subject to cross-examination. If the child is available to testify, *Crawford* simply does not allow admission of her out-of-court testimonial statements made on the videotaped forensic interviews, the contrary provisions of S.C. Code Sec. 17-23-175 notwithstanding. Because the statute violates the mandate of *Crawford*, Defendant requests that the Court find the statute unconstitutional and apply *Crawford* to exclude the videotaped forensic interviews of the child.

II. S.C. Code Sec. 17-23-175 violates *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157 (1990).

S.C. Code Sec. 17-23-175 violates *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157 (1990) in two important ways. First, to be constitutional testimony of a child witness occurring outside the presence of the defendant must be under oath with an opportunity for contemporaneous cross-examination. Second, even if constitutional, the application of S.C. Code Sec. 17-23-175 to admit out-of-court videotaped statements should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence.

A. S.C. Code Sec. 17-23-175 is not constitutional because it does not provide for an under oath, contemporaneous cross-examination as required by *Craig*.

The videotaped interviews in this case are just like videotaped testimony, except that the interviews are not under oath and there was not an opportunity for contemporaneous cross-examination. In *Craig*, the United States Supreme Court, while noting that face-to-face confrontation is best, held the testimony of a child witness via closed circuit TV did not violate the right of confrontation. The Court reasoned:

> We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: **The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination**; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition.

Id. at 851, 110 S.Ct at 3166. (emphasis added).

The *Craig* Court noted that the majority of the states had adopted procedures for child witnesses to testify via closed circuit TV or videotaped testimony. The Court concluded, "The Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." Without an oath and without contemporaneous cross-examination, there cannot be effective confrontation.

Section 17-23-175, therefore, violates the right of confrontation.

I. Even if constitutional, the application of S.C. Code Sec. 17-23-175 to admit out-of-court videotaped statements should be limited to situations where the court makes specific findings regarding the necessity of admitting the evidence.

Even if the Court determines that S.C. Code Sec. 17-23-175 does not violate the Confrontation Clause and chooses to apply the statute in determining admissibility of the videotaped forensic interviews, the Court should consider the necessity of admitting the evidence in addition to the criteria enumerated in the statute, as is required when a court determines whether to allow testimony of children via closed circuit television in child abuse cases. In *Craig*, the Court held that the Confrontation Clause does not prohibit a child witness from testifying by closed circuit television, but that a case-specific finding of necessity for the use of that procedure was required. *Id.* at 855-56, 110 S.Ct. 3169. If a finding of necessity is required in those circumstances, where a child is actually testifying during a trial and is subject to cross-examination, surely the same finding should be made for admission of an out-of-court testimonial statement in which the child witness was **not** subject to cross-examination. As noted in *Craig*, *supra*, the denial of a physical, face-to-face confrontation at trial violates the Confrontation Clause "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 851, 110 S.Ct. at 3166.

In *Craig*, the Court noted that the public policy of protecting child witnesses from the trauma of giving testimony in child abuse cases could be sufficiently important in some cases to outweigh the defendant's right of confrontation.[10] *Id.* at 853, 110 S.Ct. at 3167. However, the Court also held that the importance of protecting child witnesses outweighs the defendant's right

[10] In a footnote, the Court cites the South Carolina statute allowing videotaped testimony of an allegedly sexually abused child, S.C. Code Sec. 16-3-1550(E) (formerly 16-3-1530(G)), which was enacted in support of this public policy. *Craig*, *supra*, at 854, 110 S.Ct. at 3168, fn. 2.

of confrontation only "if the State makes an adequate showing of necessity." *Id.* at 855, 110 S.Ct. at 3169. To make that showing of necessity: (1) the State must present case-specific evidence from which the trial court can determine whether admission of videotape evidence is necessary to protect the welfare of the particular child witness; (2) the trial court must find that the child witness would be traumatized by the presence of the defendant; and (3) the trial court must find that the trauma suffered by the child witness in the presence of the defendant is more than "mere nervousness or excitement or some reluctance to testify." *Id.* at 856, 110 S.Ct. at 3169. No such showing of necessity can be made here to justify admission of the out-of-court videotaped statements of the child. In fact, in the State's motion for special procedures to prevent child from being face-to-face with defendant, the State has not requested that the child be allowed to testify outside the courtroom, but merely that a book or Kleenex box be placed in front of her on the witness stand so that she cannot see her father while she testifies. Under these circumstances, there is absolutely no necessity for admission of the videotaped forensic interviews of the child.

The South Carolina courts agree that a particularized showing of necessity is needed before videotaped or closed circuit testimony can be used to avoid face-to-face confrontation with a defendant. Although S.C. Code Sec. 16-3-1550(E) does not preclude the use of videotaped testimony for certain witnesses,[11] the judge must make appropriate findings before such procedures can be used. In *State v. Murrell*, 302 S.C. 77, 393 S.E.2d 919 (1990), the South Carolina Supreme Court affirmed the trial judge's order allowing videotaped testimony of a child witness where the judge heard expert testimony that the child would be significantly harmed by

[11]S.C. Code Sec. 16-3-1550(E) states: "The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration."

an in-court confrontation. In that case, the child witness was placed in a courtroom setting and the defendant was in an adjacent room viewing the child on video. Defendant's attorney was present in the courtroom for direct and cross-examination, and the attorney's law partner was in the room with the defendant, with three-way communication available at all times between the attorneys and the defendant. *Id.* at 71, 393 S.E.2d 920-921. In *State v. Bray*, 342 S.C. 23, 535 S.E.2d 636 (2000), the South Carolina Supreme Court determined that although the record contained sufficient evidence to support a finding that testimony of a child witness should be given by closed circuit television, reversal was mandated because the trial court failed to make specific findings for its ruling allowing testimony outside the presence of the defendant, specifically failing to cite to testimony that the child would be traumatized if required to testify in the presence of defendant. *Id.* at 31-32, 535 S.E.2d 641. These requirements for case-specific findings of necessity for admission of videotaped or closed circuit television testimony should limit S.C. Code Sec. 17-23-175 in a similar manner. Because the statute does not require a finding of necessity for admission of videotaped forensic interviews, it contravenes the provisions of *Craig* and its progeny and therefore violates defendant's right of confrontation. Furthermore, as noted previously, no showing of necessity can be made in this case since the State has conceded that a book or Kleenex box in front of the child is sufficient to protect her while she testifies.

III. The "particularized guarantees of trustworthiness" enumerated in S.C. Code Sec. 17-23-175(B) are not adequate to protect the defendant's right of confrontation and furthermore, are not met in this case.

Prior to *Crawford, supra*, the United States Supreme Court, in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, conditioned the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of

trustworthiness." *Id.* at 66, 100 S.Ct. 2539. Under the *Roberts* test, the "particularized guarantees of trustworthiness" enumerated in S.C. Code Sec. 17-23-175(b) perhaps could have been held to pass constitutional muster. However, the Court abrogated *Roberts* in the *Crawford* decision, finding that the *Roberts* test was too broad in that "[i] t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony," yet at the same time too narrow in that "[i]t admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability." *Crawford*, *supra,* at 60, 124 S.Ct. 1369. The Court stated: "This malleable standard often fails to protect against paradigmatic confrontation violations." *Id.*

The particularized guarantees of trustworthiness that render firmly rooted hearsay exceptions reliable **do not** exist with regard to the videotaped forensic interviews in this case. Almost all the firmly rooted hearsay exceptions recognized in our jurisprudence apply to non-testimonial statements, with the exception of certain dying declarations that might be made in a testimonial context. *Id.* at 56, 124 S.Ct. 1367, fn. 6. The *Crawford* Court had the following to say about the fallacy of using the "reliability" determination when dealing with testimonial statements such as the videotaped interviews at issue here:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone,

> Commentaries, at 373 ("This open examination of witnesses ... is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Id. at 61, 124 S.Ct. at 1370.

Under the reasoning of *Crawford*, the "particularized guarantees of trustworthiness" factors enumerated in S.C. Code Sec. 17-23-175(B) simply cannot suffice to allow admission of the out-of-court testimonial hearsay statements contained in the videotaped forensic interviews. Without a prior opportunity for cross-examination on those statements, admission of the videotapes clearly violates defendant's right of confrontation. Furthermore, even if the factors listed in the statute were adequate to evaluate admissibility, several of the factors are not met in this case, not least of which is whether the child's statements were elicited by leading questions. For these reasons, the videotaped forensic interviews should be excluded from evidence.

IV. If the videotapes are admitted, South Carolina's rule of completeness requires that portions adverse to the State's case must also be shown to the jury.

South Carolina Rule of Evidence 106 provides as follows: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." *See also State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975) (holding that when part of a conversation is put into evidence, an adverse party is entitled to prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited. "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if

one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it.**"**)

Defendant is informed and believes that if the Court finds the videotaped forensic interviews admissible, the State will request redaction of portions of the tape in which the child witness alleges that defendant also abused the child's sibling. Defendant's position is that the State wishes to exclude these portions of the tape because defendant was not charged with abusing the sibling and there is no evidence whatsoever to corroborate any abuse of the sibling. Under the rule of completeness, the jury should also see these portions of the videotaped interviews.

Conclusion

For the foregoing reasons, Defendant requests that the videotaped forensic interviews be excluded from evidence. Alternatively, if admitted, Defendant requests that the court require that portions of the videotaped interviews adverse to the State's case also be shown to the jury.

IT IS SO MOVED.

Respectfully submitted,

_____

E. Charles Grose, Jr.

Janna A. Nelson

_____, 2010
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
	)	
THE STATE	)	Cases No:
	)	
vi.	)	
	)	
	)	Memorandum in Opposition to State's Motion
_____,	)	to Admit Evidence of Prior Bad Acts
Defendant	)	
_____	)	

To: The Honorable D. Garrison Hill, Presiding Judge, Eighth Judicial Circuit

Defendant has waited over three years for his case to be called to trial. The State would not be calling his case to trial during this term of court but for the Honorable J. Cordell Maddox, Jr. ordering this case be tried beginning on Monday, June 18, 2012. Rather than relying on the evidence in this case, the State wants the jurors to consider evidence of a prior, unrelated crime Mr. Defendant committed in Kentucky. Consideration of this evidence reduces the prosecution's burden of proof, risking that the jurors will convict Mr. Defendant based on the prior crime, rather than proof beyond a reasonable doubt of the elements of the crime alleged in the indictment.

Mr. Defendant, therefore, opposes the prosecution introducing evidence of his conviction in Kentucky. This evidence, involving an individual different than the victim in this case, is impermissible propensity evidence. If the prosecution seeks to introduce such evidence pursuant to Rule 404(b), SCRE, then the Court should convene an *in camera* hearing to determine whether the state can meet its burden of proof regarding the admissibility of this evidence. If the Court determines this evidence is admissible under South Carolina's interpretation of Rule 404(b), then the Court still must exclude the evidence as a violation of Mr. Defendant's right to due process.

Factual Background

This section will review the prosecutions' original allegations in the current case, the information the State has obtained from Kentucky, and the suspicious expansion of the timeframe of the current allegations on the eve of trial.

Original Allegations in the Current Case.

Summarize the allegations of the case to be tried.

Kentucky conviction.

Summarize the allegations of the prior bad act the State seek to introduce in the current trial.

Argument

The prosecution's case against Mr. Defendant is weak, at best. In fact, Mr. Defendant rejected an offer of probation and obtained a speedy trial order setting a trial date. The prosecution seeks to admit this evidence to portray Mr. Defendant to the jurors as a child molester in the hopes the jurors will convict him based on the prior bad act rather than the evidence presented at trial. "[P]ropensity would be an 'improper basis' for conviction." *Old Chief v. U.S.*, 519 U.S. 172, 182 (1997).

After reviewing the authority for an *in camera* hearing, Mr. Defendant will explain why this Court should exclude evidence of the Kentucky offense for two reasons. First, the evidence is not admissible under Rule 404(b), SCRE. Second, if this Court determines this evidence admissible as an exception to Rule 404(b), then South Carolina's rule allowing admission of propensity evidence in child sexual abuse cases violates due process.

I. Authority for *In Camera* Hearing

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. The State has the burden of establishing one of these exceptions.

If the Court determines the evidence to be admissible as an exception to Rule 404(b), then "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case." *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). *See also* Rule 403, SCRE.

An *in camera* hearing is necessary to determine both the applicability of one of these exceptions to this rule and, if necessary to weigh the prejudicial effect and the probative value. *E.g. State v. Wallace*, 384 S.C. 428, 431-432, 683 S.E.2d 275, 277 (2009) ("[A]fter an in camera hearing, the trial judge allowed Sister to testify that she was also sexually abused by respondent."); *State v. Clasby*, 385 S.C. 148, 152, 682 S.E.2d 892, 894 (2009) ("[T]he trial judge conducted an *in camera* hearing regarding the alleged prior bad act evidence.").

II. Rule 404(b).

The Kentucky crime is not admissible under Rule 404(b) for three reasons. First, the evidence is not admissible under a traditional interpretation of Rule 404(b). Second, although the prosecution might rely on *State v. Walla*ce, 384 S.C. 428, 683 S.E.2d 275 (2009) (charged offense and defendant's prior bad act of sexually abusing victim's sister were sufficiently similar for evidence of the bad act to be admissible under Rule 404(b) to show common scheme or plan), there is substantial uncertainty about the continued validity of *Wallace*. Third, even if the Court

finds this evidence to be admissible, the prejudicial effect of the evidence substantially outweighs the probative value.

A. The evidence is not admissible under a traditional interpretation of Rule 404(b).

> In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. ***Both rules are grounded on the policy that character evidence is not admissible for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.***

State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718-19 (1998) (internal quotations and citations omitted) (emphasis added). Traditionally, admissibility under *Lyle*[12] and Rule 404(b) is ***not*** determined by similarity. Regarding the admissibility of prior crimes, our Supreme Court warned in *Lyle*:

> True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude.

Lyle, 125 S.C. at 420, 118 S.E. at 808. "The substance of these common law rules has now been codified in" Rule 404, SCRE. *Nelson*, 331 S.C. at 6, (fn. 7), 501 S.E.2d at 718-19, (fn. 7).

Under the traditional interpretation of the rule, "[i]f the court does not clearly perceive the connection between the extraneous transactions and the crime charged, that is, its logical relevance, the accused should be given the benefit of the doubt, and the evidence rejected." *State v. Brooks*, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000). *See also State v. Fletcher*, 379 S.C. 17, 25 (fn. 3), 664 S.E.2d 480, 484 (fn. 3) (2008) ("Prior acts must be so intimately connected to

[12] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

the crimes charged that their introduction is appropriate to complete the story of the crime charged."); *State v. Pagan*, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); *State v. Timmions*, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997) ("A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary."); *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993) ("noting that "a general similiarity . . . [is] insufficient to support the common scheme or plan exception."); *State v. Johnson*, 293 S.C. 321, 234, 360 S.E.2d 317, 319 (1987) (Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged."); *State v. Stokes*, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) ("The 'common scheme or plan' exception requires more than a mere commission of two similar crimes by the same person. There must be some connection between the crimes. If there is any doubt as to the connection between the acts, the evidence should not be admitted.").

Mr. Defendant anticipates the prosecution will rely on the perceived similarities between the Kentucky allegations and the Greenwood charges. Mr. Defendant further anticipates the State will rely on *Wallace, supra.*[13] In *Wallace*, by focusing on similarity, our Supreme Court departed from the traditional interpretation of Rule 404(b).[14] In Argument II(B), *infra*, Mr.

[13] The defendant in *Wallace* did not challenge the admission of the prior bad act evidence as a violation of due process. *See* Argument III, *infra*.

[14] At least one state court has returned to the traditional application of Rule 404(b) in sexual abuse cases. *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind.,1992) ("We hasten to add that abandoning the depraved sexual instinct exception does not mean evidence of prior sexual misconduct will never be admitted in sex crimes prosecutions. It means only that such evidence will no longer be admitted to show action in conformity with a particular character trait. It will continue to be admitted, however, for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.").

Defendant will explain why the continued validity of *Wallace* is in question. However, even under *Wallace*, prior bad act evidence is not automatically admissible. *E.g. State v. Fonseca*, 393 S.C. 229, 229, 711 S.E.2d 906, 906 (2011) ("The Court of Appeals properly held that the circuit court erred in permitting the State to introduce evidence of the 2001 incident, and properly summarily disposed of the State's additional sustaining ground.").

Wallace requires "the trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery." *Wallace*, 384 S.C. at 433-34, 683 S.E.2d at 278. Applying these factors, the prosecution cannot meet its burden of proof. None of the factors are similar:

Factor	South Carolina Allegation	Kentucky Allegations
1 **Age of Victim**		
2 **Relationship b/t Parties**		
3 **Location**		
4 **Coercion of Threats**		
5 **Manner of Occurrence** **Type of Sexual Battery**		

If the suspicious expansion of the incident dates is excluded, no similarities exist. Even considering this suspect evidence, the majority of the evidence is dissimilar. Courts have strictly required similarities for all the *Wallace* factors. *E.g. State v. Taylor*, 396 S.C. 193, 202, 720 S.E.2d 522, 526 - 527 (Ct. App. 2011) ("Turning to the *Wallace* factors, the 1998 and 1999 rapes

occurred nine months apart when Victim was 11 to 12 years old. Taylor was the Victim's pastor. While the physical locations where the rapes occurred are not identical, both rapes occurred in connection with church organized outings. After both rapes Taylor threatened Victim to prevent him from revealing the rapes. Finally, the type of sexual battery in 1998 is identical to the sexual battery in 1999. In sum, with the exception of the physical location of the rapes, all the *Wallace* factors are highly similar.").

B. Uncertainty about the continued validity of *State v. Wallace*.

Because the composition of our Supreme Court has changed, the continued validity of *Wallace,* is uncertain. There is a reasonable probability there are sufficient votes on the current court to overrule *Wallace*.

Justice Pleicones dissented in *Wallace*, noting our Supreme Court's "cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a 'common scheme or plan' under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence." *Wallace*, 384 S.C. at 435-36, 683 S.E.2d at 279. It is reasonable to believe Justice Pleicones would vote to overrule *Wallace*. *See State v. Hubner*, 384 S.C. 436, 437, 683 S.E.2d 279, 280 (2009) (Pleicones J. dissenting) ("For the reasons given in my dissent in *State v. Wallace* . . . I respectfully dissent.").

Justice Burnett, who authored *Wallace*, and Justice Waller, who voted with the majority in *Wallace*, have retired from the Court. They have been replaced by Justices Hearn and Kittredge. It is reasonable to believe Justice Hearn would vote to overrule the Supreme Court's opinion that reversed the Court of Appeals opinion she authored in *State v. Wallace*, 364 S.C. 130, 611 S.E.2d 332 (Ct. App. 2005). Based on his prior, scholarly opinion rejecting propensity evidence, it is reasonable to believe Justice Kittredge would vote to overrule *Wallace*. *See State*

v. Tuffour, 364 S.C. 497, 504, 613 S.E.2d 814, 818 (Ct. App. 2005) ("The appellate courts of this state have unwaveringly adhered to the rule of exclusion of prior bad act evidence to show criminal propensity or that the defendant is a bad person unworthy of the presumption of innocence.") *vacated by State v. Tuffour*, 371 S.C. 511, 641 S.E.2d 24 (2007).

Justices Pleicones, Hearn, and Kittredge, therefore, could provide the necessary votes to overrule *Wallace*. Mr. Defendant, therefore, believes it is likely our Supreme Court will eventually adopt the Court of Appeals opinion in *Wallace*. A copy then Chief Judge's Hearn's opinion is attached and incorporated by reference.

C. The prejudicial effect substantially outweighs the probative value.

Even after Wallace, "[o]nce bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. The probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant." *Wallace*, 384 S.C. at 435, 683 S.E.2d at 278-79 (2009).

If the Court admits the evidence of the Kentucky conviction, then there is a danger the jurors will convict Mr. Defendant based on this prior crime rather than based on proof beyond a reasonable doubt of the elements of the crime charged in the indictment. *See Old Chief*, 519 U.S. at 181 ("Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.").

III. Due Process.

Wallace, and similar appellate court decisions of this state,[15] created a rule allowing admission of prior bad acts against individuals other than the alleged victim[16] in the case to demonstrate general propensity. *See Wallace, supra,* (Pleicones J. dissenting); *State v. Fonseca*, 383 S.C. 640, 647, 681 S.E.2d 1, 4 (Ct. App. 2009) ("Although *Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses.") *affirmed by State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (2011) .

South Carolina's rule allowing admission of propensity evidence in child sexual abuse cases violates due process.

A. United States Constitution.

Although the Supreme Court of the United States has not addressed "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime," *Estelle v. McGuire*, 502 U.S. 62, 75, fn. 5 (1991), the High Court has recognized the unfair danger of admitting such evidence by explaining:

> Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. ***The inquiry is not rejected***

[15] *E.g. State v. Hubner*, 384 S.C. 436, 683 S.E.2d 279 (2009); *State v. Hallman*, 298 S.C. 172, 379 S.E.2d 115 (1989); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984); and *State v. Rivers*, 273 S.C. 75, 254 S.E.2d 299 (1979).

[16] This motion does not address the situation when the victim in the case is subjected to ongoing abuse by the defendant. *E.g. State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009); *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); *State v. Whitener*, 228 S.C. 244, 89 S.E.2d 701 (1955); and *State v. Richey*, 88 S.C. 239, 70 S.E. 729 (1911).

> ***because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.***

Michelson v. U.S., 335 U.S. 469, 475-76 (1948) (internal citations omitted) (emphasis added). *See also, Old Chief, supra* (holding the exact nature of a prior crime too prejudicial to be admissible even though it was an element of the current offense).

Mr. Defendant, therefore, anticipates the Supreme Court of the United States will ultimately hold that the admission of propensity evidence violates due process.

Even if the Court does not categorically ban the admission of such evidence, the Court likely will require strict application of rules of evidence to ensure against violations of a defendant's fundamental right to a fair trial. Congress has enacted Rules 413 and 414, FRE that create a rule similar to *Wallace* in Federal Court. The federal rule was controversial from the start, as it

> runs counter to a centuries-old legal tradition that views propensity evidence with a particularly skeptical eye. The common law, of course, is not embodied in the Constitution, but the fact that a rule has recommended itself to generations of lawyers and judges is at least some indication that it embodies fundamental conceptions of justice. It also cannot be irrelevant that the members of two committees, consisting of 40 persons in all, and appointed by the Judicial Conference of the United States to examine Fed. R. Evid. 413 before its passage, all but unanimously urged that Congress not adopt the rule because of deep concerns about its fundamental fairness. Members of the committees worried that the new rule would displace essential protections [that have] form[ed] a fundamental part of American jurisprudence and have evolved under longstanding rules and case law.

U.S. v. Mound. 157 F.3d 1153 (8th Cir. 1998) (Arnold, J., dissenting from denial of rehearing *en banc*) (internal quotations and citations omitted).

The federal rule admitting this evidence has survived Constitutional challenge, but only because of the strict protections of Rule 403, FRE. *E.g. U.S. v. LeMay*, 260 F.3d 1018, 1022 (9th

Cir. 2001) ("Rule 403 remains applicable to evidence introduced under Rule 414, and, if conscientiously applied, will protect defendants from propensity evidence so inflammatory as to jeopardize their right to a fair trial."); *U.S. v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) ("Considering the safeguards of Rule 403, we conclude that Rule 413 is not unconstitutional on its face as a violation of the Due Process Clause."); *U.S. v. Castillo*, 140 F.3d 874, 882-83 (10th Cir. 1998) ("Application of Rule 403, however, should always result in the exclusion of" prior bad act evidence that "is so prejudicial that it violates the defendant's fundamental right to a fair trial.").

B. South Carolina Constitution.

It is well settled that a state can decide a constitutional issue on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). South Carolina has a tradition of deciding constitutional issues based on adequate and independent state grounds. *Eg. State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985) (chemical castration is cruel and unusual punishment pursuant to S.C. Const Art I, §15); *State v. Forrester*, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) ("The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment."). Article I, Section 3 of the South Carolina Constitution guarantees due process of law.

Other state courts that have addressed this issue hold that introducing this type of propensity evidence violates the due process clauses of state constitutions. For example, "[b]ased on Iowa's history and the legal reasoning for prohibiting admission of propensity evidence out of fundamental conceptions of fairness, . . . the Iowa Constitution prohibits admission of prior bad acts evidence based solely on general propensity." *State v. Cox*, 781

N.W.2d 757, 768 (Iowa 2010). In reaching this conclusion, the Iowa Supreme Court reviewed its state's "policy against admissibility of general propensity evidence stems from a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds." *Id*. at 767 (internal quotations omitted).

The Iowa Supreme Court further noted, "The general rule prohibiting propensity evidence was firmly established in Iowa courts at common law. *Id*. at 764 (citing *State v. Vance,* 119 Iowa 685, 686, 94 N.W. 204, 204 (1903)). Likewise, the Missouri Supreme Court "act[ed] consistently with a long line of cases holding that the Missouri constitution prohibits the admission of previous criminal acts as evidence of a defendant's propensity" and invalidated a state statute admitting this type of evidence in child sexual abuse cases. *State v. Ellison*, 239 S.W.3d 603, 607-08 (Mo. 2007).

The same considerations are just as firmly rooted in South Carolina's common law. Our Supreme Court decided *Lyle* in 1923 based on this state's precedent. *See State v. Kenny*, 57 S.E. 859, 861-62 (S.C. 1907) ("Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime. . . . Without [an] obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury.").

The Court, therefore, should hold that introducing evidence of a prior crime, involving an individual different than the alleged victim in this case, is impermissible propensity evidence and violates the due process clause of Article I, Section 3 of the South Carolina Constitution.

Conclusion

This Court should not allow the prosecution to introduce evidence of Mr. Defendant's prior Kentucky conviction under Rule 404(b), SCRE.

IT IS SO MOVED.

Respectfully submitted,

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E. Charles Grose, Jr.

June 18, 2012
Greenwood, South Carolina